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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 203

THE UNITED STATES, PETITIONER,

vs.

JOHN STUART KELLY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITION FOR CERTIORARI FILED JULY 26, 1951.
CERTIORARI GRANTED OCTOBER 8, 1951.

SUPREME COURT OF THE UNITED STATES

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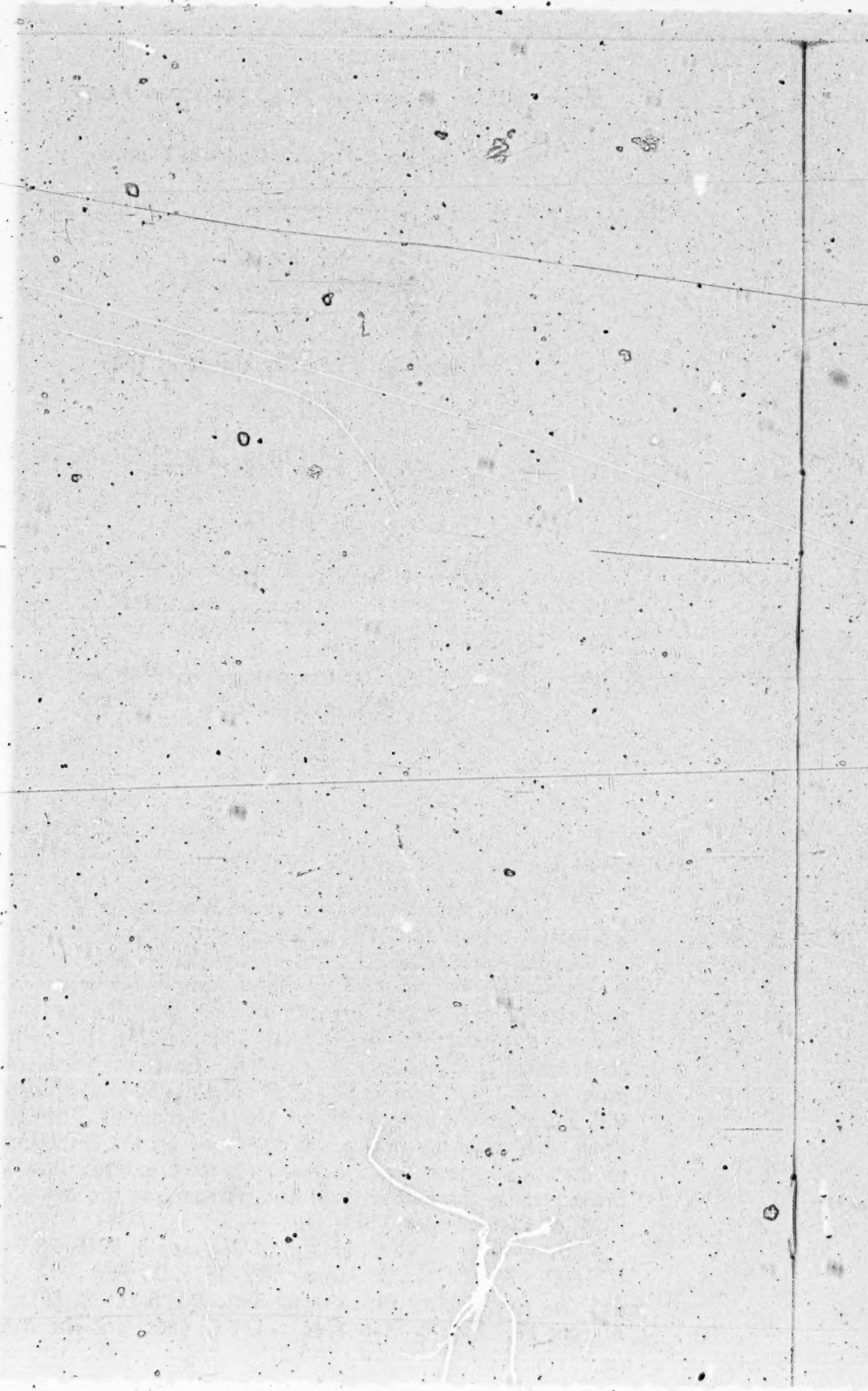

1 In the United States Court of Claims

No. 49299

PETITION—Filed September 2, 1949

JOHN STUART KELLY, ET AL.

2 *Plaintiffs,*

v.

THE UNITED STATES, *Defendant.*

To the Honorable, The Court of Claims:

1. At all times material hereto the plaintiffs were, and now are, citizens of the United States of America.

2. During all or a part of the period from September 1, 1943, to October 15, 1945, each of the above-named plaintiffs was regularly employed as a journeyman printer, bookbinder, electrician, painter, photo-engraver, platemaker, pressman, or stereotyper, by the Government Printing Office, Washington, D. C.

3 3. Plaintiffs were employed by the Public Printer. Their compensation was fixed by wage agreements negotiated by the Public Printer and committees of employees representing the respective trades of the plaintiffs involved herein, namely the journeymen printers, the journeymen bookbinders, the journeymen electricians, the journeymen painters, the journeymen photo-engravers, the journeymen platemakers, the journey pressmen, and the journeymen stereotypers of the Government Printing Office. Each such wage agreement was approved by the Joint Committee on Printing. Such wage agreements were entered into and approved under the authority of and pursuant to the Act of June 7, 1924, 43 Stat. 658, 44 USC. §40.

4. In accordance with the Act of January 6, 1885, 23 Stat. 516, 5 U.S.C. §86, the Act of January 12, 1895, 28 Stat. 607, 44 U.S.C. §44, the Act of May 13, 1938, 52 Stat. 351, 5 U.S.C. §87a, the Act of June 29, 1938, 52 Stat. 1246, 5 U.S.C. §86a, and the Act of De-

cember 26, 1941, 55 Stat. 862, 5 U.S.C. §87b, plaintiffs, at all times material hereto, were entitled to the following holidays with full pay, when prevented or relieved from working solely because of the occurrence of such holidays: New Year's Day, Washington's Birthday, Memorial Day, the 4th of July, Labor Day; Armistice Day, Thanksgiving Day, Christmas Day, and Inauguration Day. In addition plaintiffs were entitled to full pay whenever relieved or prevented from working on any other day declared a holiday by Federal statute or Executive order, and any day on which the departments and establishments of the Government were closed by Executive order.

5. Each of the wage agreements referred to in paragraph 3 of this petition contained the following provision relating to
4 compensation for work performed by plaintiffs on holidays:

> *Holiday Rate.* Employees required to work on a legal holiday or a special holiday declared by Executive order shall be paid at the day rate plus 50% of all the time actually employed in addition to their gratuity pay for the holiday as provided by law . . .

6. During said period from September 1, 1943, to October 15, 1945, plaintiffs were regularly required to and did work on the following holidays, or some of them, all of which were holidays on which plaintiffs were entitled to be released from work with an ordinary day's pay in accordance with the statutes set forth in paragraph 4 of this petition:

September 6, 1943	Labor Day
November 11, 1943	Armistice Day
November 25, 1943	Thanksgiving Day
December 25, 1943	Christmas Day
January 1, 1944	New Year's Day
February 22, 1944	Washington's Birthday
May 30, 1944	Memorial Day
July 4, 1944	Fourth of July
September 4, 1944	Labor Day
November 11, 1944	Armistice Day
November 23, 1944	Thanksgiving Day
December 25, 1944	Christmas Day
January 1, 1945	New Year's Day
January 20, 1945	Inauguration Day
February 22, 1945	Washington's Birthday
May 30, 1945	Memorial Day
July 4, 1945	Fourth of July
September 3, 1945	Labor Day

7. For work performed on the aforementioned holidays, plaintiffs received only the same rate of pay as for work performed on ordinary work days. They did not receive the additional
5 compensation required by the statutes and the "Holiday Rate" provision of the wage agreements set forth in paragraphs 4 and 5 respectively of this petition. Plaintiffs claim additional compensation in accordance with said statutes and wage agreements.

8. On April 23, 1948, plaintiff John Stuart Kelly submitted a claim for holiday compensation to the Acting Public Printer requesting that he be allowed additional compensation for work performed by him on holidays during the period from May 30, 1940, to July 4, 1944, in accordance with the "Holiday Rate" provision of the wage agreement set forth in paragraph 5 of this petition.

9. On March 28, 1949, the Comptroller General issued a settlement certificate on Claim No. 1925381, in which he disallowed plaintiff John Stuart Kelly's claim and certified that no balance was due him from the United States. A copy of said Settlement Certificate is attached hereto and made a part hereof as Exhibit No. 1.

10. Each of the above-named plaintiffs claims and asks judgment for $250.00, more or less, representing compensation due him for work performed on holidays during the period from September 1, 1943, to October 15, 1945. The amounts of each claim shall be subject to exact computation from the records of the Public Printer prior to entry of judgments herein.

11. No other action has been taken on said claims in Congress or by any of the Departments; no persons other than the plaintiffs are the owners thereof or interested therein; no assignments or transfers of these claims, or any part thereof, or interest therein,
6 have been made; the plaintiffs are justly entitled to the amounts as herein claimed from the United States after allowing all just credits and offsets; the plaintiffs have at all times borne true allegiance to the Government of the United States and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the Government.

WHEREFORE, each of the above-named plaintiffs prays judgment against the United States in the amount of $250.00, more or less, subject to exact computation as aforesaid.

POSNER, BERGE, FOX & ARENT,
1200 18th Street, N. W.,
Washington 6, D. C.,
Attorneys for Plaintiffs.

Duly sworn to by Henry J. Fox. Jurat omitted in printing.

7 EXHIBIT No. 1

SETTLEMENT CERTIFICATE

GENERAL ACCOUNTING OFFICE, WASHINGTON 25, D. C.

In correspondence please refer to:
Division: Claims
Claim No.: 1925381

March 28, 1949.
(Date)

Stuart Kelly,
4713 45th Street, N. W.,
Washington 16, D. C.

Sir:

Your claim for additional compensation in the amount of $223.56, alleged to be due for services rendered on holidays falling within your regular tour of duty during the period May 30, 1940 to July 4, 1944, as an employee of the Government Printing Office, Washington, D. C., has been carefully examined, and it is found that no part thereof may be allowed for the reasons hereinafter stated.

It is noted you allege your rate of pay was controlled by the provisions of a wage agreement entered into in 1924, under the authority of the act of June 7, 1924, 43 Stat. 658, which provisions were continued in effect by a wage agreement approved by the Congressional Joint Committee on July 1, 1926, until August 13, 1944, when a superseding agreement was consummated. It is further noted you refer to the Comptroller General's decision of August 23, 1938, 18 Comp. Gen. 191, in which it was held that employees of the Government Printing Office working on a five-day 40-hour week basis, who work on a holiday coming within their regular tour of duty, were entitled only to one day's pay, and not to pay for the holiday and in addition for the time actually worked on the holiday at their regular rates of pay, but you contend this ruling does not apply in your case since your rate of pay was set by the wage agreement and that Public Resolution No. 127,
8 June 29, 1938, 52 Stat. 1246, does not by its terms prohibit or make ineffective provisions of the wage agreement relating to extra compensation and holiday pay.

The pertinent part of the wage agreement in question provided, in effect, that work performed on a holiday shall be paid for at the day rate plus 50 percent which amount shall be in addition to any gratuity pay for the holiday as provided by law. The wage agreement does not create nor purport to create any right to gratuity pay for holidays—that right already having been created by the

holiday gratuity pay statutes in effect when the agreement was entered into and approved by the Joint Committee on Printing—but merely provides that the right to holiday pay at the rates prescribed therein shall be exclusive of and in addition to any gratuity pay provided by law. With the repeal of the holiday gratuity pay statutes by Public Resolution No. 127, *supra*, except as provided therein, gratuity pay for holidays was no longer "provided by law." Therefore, after June 29, 1938, under the terms of the wage agreement itself the maximum compensation payable for work on holidays was the day rate plus 50 percent.

It has been consistently held that payment at rates in excess of the regular daily rate for work on holidays falling within the regular tour of duty of employees paid upon other than an annual basis is in contravention of the 40-hour week statute of 1934 (section 23 of the act of March 28, 1934, 48 Stat. 522). See 13 Comp. Gen. 295; 18 *id.* 191; 21 *id* 217; 25 *id* 584.

I therefore certify that no balance is found due you from the United States.

Respectfully,

LINDSAY C. WARREN,
Comptroller General of the United States.

By: H. R. GRAHAM (Signed)

GENERAL TRAVERSE—Filed October 12, 1949

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

(S.) H. G. MORISON,
Assistant Attorney General.

9 STIPULATION OF FACTS—Filed October 12, 1950

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the facts hereinafter set forth, shall be deemed to have been proved by competent evidence and shall constitute a part of the record in this case; provided that either party may object to any facts hereinafter stipulated and agreed to on the grounds of irrelevancy and immateriality; and provided further that either party may hereafter adduce material evidence consistent with the facts stipulated herein.

It is agreed by and between the parties that the basic questions of law and fact involved in this action are common to all of the plaintiffs in this action. The facts hereinafter set forth shall be only those facts relevant to the claim of plaintiff John Stuart Kelly,

hereinafter called Kelly, and that upon the determination of the questions of law in the case of Kelly the right of all other plaintiffs involving identical questions of law shall be thereby resolved. In the event of a decision that Kelly is entitled to recover, the amount of his damages and of each of the other plaintiffs involved herein shall be computed from the records of the Public Printer.

1. At all times material hereto plaintiff Kelly has been and is now a citizen of the United States of America.

2. During all or part of the period from September 1, 1943, to October 15, 1945, Kelly was regularly employed as a journeyman printer by the Government Printing Office, Washington, D. C.

3. Kelly was employed by the Public Printer. His compensation was fixed by a wage agreement negotiated by the Public Printer and a committee of employees representing the journeymen printers of the Government Printing Office. Such wage agreement was approved by the Joint Committee on Printing, and originally became effective October 27, 1924. Such wage agreement was entered into and approved under the authority of and pursuant to the Act of June 7, 1924, 43 Stat. 658, 44 U.S.C. Section 40. Such wage agreement was amended from time to time thereafter.

4. The wage agreement and amendments thereto, referred in paragraph 3 of this stipulation, at all times material hereto contained the following provisions [1] relating to the rates of compensation for work performed on night shifts, Sundays, holidays, and during overtime hours:

> *Night rate.* Employees required to work on a regular night shift shall be paid 15 per cent in addition to the day rate for the time actually employed up to 8 hours. An employee whose regular shift consists of part day and part night hours shall be paid entirely at the rate provided for the majority of the time so employed. No employee will be granted extra pay for night work for which he is allowed overtime, Sunday, or legal or special holiday rates of pay.
>
> *Sunday Rate.* Employees required to work on Sunday shall be paid 50 per cent in addition to the day rate for all the time actually employed on said Sunday: *Provided,* that employees

[1] Exhibit A attached hereto and hereby incorporated in this stipulation is a statement of the Public Printer of August 30, 1924, to the committees representing the trades in the Government Printing Office setting forth the proposed rates of pay for night, Sunday, holiday, and overtime work which was incorporated in the wage agreement between the employees and the Public Printer and approved by the Joint Committee on Printing on October 27, 1924.

whose regular shift begins on Saturday night shall be paid at the week night rate, and employees whose shift begins on Sunday night at the Sunday rate, for all the time actually employed on such shift.

Holiday Rate. Employees required to work on a legal holiday or a special holiday declared by Executive Order shall be paid at the day rate plus 50 per cent for all the time actually employed in addition to their gratuity pay for the holiday as provided by law; holiday rate shall apply to all hours of a regular shift beginning work on the holiday, but not to any hours of a regular shift beginning work prior to a holiday and ending on the holiday. Employees required to work more than 4 hours but not exceeding 8 hours on Saturdays on which, by the Executive Order of June 13, 1924, 4 hours shall constitute a day's work, shall be paid their regular rate for time actually so employed in excess of said 4 hours, in addition to pay for 8 hours at their regular rate.

Overtime Rate. Employees on the day or night shifts who are required to work in excess of 8 hours in any period of
12 24 consecutive hours shall receive 50 per cent in addition to the regular day rate for the period of said overtime work. No employee will be granted extra pay for overtime for which he is allowed pay at the Sunday or legal or special holiday rate.

5. During the period from September 5, 1943 to February 23, 1945, Kelly was required to and did work eight hours on each of the following holidays:

September 6, 1943	Labor Day
November 11, 1943	Armistice Day
November 25, 1943	Thanksgiving Day
February 22, 1944	Washington's Birthday
May 30, 1944	Memorial Day
July 4, 1944	Fourth of July
September 4, 1944	Labor Day
November 23, 1944	Thanksgiving Day
January 1, 1945	New Year's Day
February 22, 1945	Washington's Birthday

6. For work performed on the holidays specified in paragraph 5 of this stipulation, Kelly received only the same rate of pay as for work performed on ordinary work days. On the holidays falling between September 6, 1943 and July 4, 1944, both dates inclusive, the day rate for work of the type performed by Kelly was $1.38 per hour, and the night rate was $1.584 per hour. Kelly, who worked on the night shift, was paid at the rate of $1.584 per

hour for all time worked on such holidays. On the holidays specified in paragraph 5 of this stipulation subsequent to July 4, 1944, the day rate for work of the type performed by Kelly was $1.52 per hour, and the night rate was $1.75 per hour. Kelly also worked on the night shift on these holidays, and was paid at the rate of $1.75 per hour for such work.

13 7. On April 23, 1948, Kelly submitted a claim[2] to the Acting Public Printer requesting that he be allowed additional compensation for certain holidays among those set forth in paragraph 5 of this stipulation. A true copy of this claim is attached hereto and marked Exhibit B. Thereafter, this claim was forwarded to the Comptroller General's Office.

8. On March 28, 1949, the Comptroller General issued a Settlement Certificate on Claim No. 1925381, in which he disallowed Kelly's claim and certified that no balance was due him from the United States. The Comptroller General denied the claim for additional compensation for work on said holidays. A true copy of such Settlement Certificate is attached to the petition herein as Exhibit 1.

9. Upon the enactment of section 23 of the act of March 28, 1934 (40-hour week law), the Public Printer on April 9, 1934, requested a decision from the Comptroller General of the United States on the following question:

> Under authority of act of June 7, 1924 (U. S. C., title 44, sec. 40), time heretofore actually worked on Sundays and legal holidays has been considered as overtime and paid at time and one-half rate. In the application of section 23, supra, is such time to be considered as overtime regardless of whether or not 40 hours has been worked in the week concerned, or is such time worked on Sundays and legal holidays a part of the 40 hours to be worked in one week before any overtime may be paid?

14 In his reply (13 Comp. Gen. 295), the Comptroller General on April 23, 1934, stated in material part:

> The legal holidays mentioned in the act of January 12, 1895 (28 Stat. 607), should be included as a part of the 40-hour week for employees of the Government Printing Office (12 Comp. Gen. 21; decision of January 25, 1934, A-35169). Employees who are not required to work on said holidays are

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[2] No other plaintiff filed a claim for additional compensation for work on holidays prior to the petition in this case. Kelly's claim was submitted by himself in his own behalf and did not purport to represent any other claimant or plaintiff in this action.

nevertheless entitled to their regular compensation for the day, and employees not paid on an annual basis, who are required to work on said holidays, are entitled for the time worked on such days, to their regular rate of compensation (not "time and one-half") in addition to the regular pay for the holidays.[3]

Thereafter, and until September 5, 1938, employees of the Government Printing Office who were required to work on a legal holiday were paid for the number of hours worked at their regular rate of compensation, plus gratuity pay for the holiday.

10. After the enactment into law of Public Resolution 127, approved June 29, 1938, the Public Printer requested a decision from the Comptroller General on the following question:

> September 5 next is a legal holiday. Several employees in this office will be required to work on that day. Shall they be paid for the holiday—eight hours—and, in addition for the time actually worked at their rate of compensation? (See Comp. Gen. 13-295.)

The Comptroller General replied as follows (18 Comp. Gen. 191):

> It is understood from question No. 2 that September 5, Labor Day, is within the regular tour of duty of 40 hours per week. Whether the employees work 8 hours or less on that day they will be entitled only to 1 day's pay—not to pay for the holiday and in addition for the time actually worked on the holiday at their regular rates of pay. The cited decision has been rendered inoperative by Public Resolution of June 29, 1938, to this extent.

In accordance with this decision, employees of the Government Printing Office required to work on a legal holiday during the pe-

[3] The Act of April 16, 1880, 21 Stat. 304, provided that employees of the Government Printing Office should receive gratuity pay for five specified holidays whenever they fell on a regular work day. Commencing with the Act of January 12, 1895, per diem, per hour and piece-work employees of the Government Printing Office received gratuity pay for eight specified holidays regardless of whether they fell on a regular work day or on a non-work day. If such employees worked on one of the specified holidays, they received their regular rate of pay plus the holiday gratuity pay. Subsequent to the 1924 wage agreement, until the Comptroller General's decision in 1934 (13 Comp. Gen. 295), such employees received the gratuity pay for holidays when they did not work; whenever they worked on such a holiday, they received one and ½ times the day rate for all hours of work plus the gratuity pay for the holiday.

ried June 29, 1938 to May 28, 1946, inclusive, received pay for 1 day only and no gratuity holiday pay, in addition to the pay for the time actually worked on the holiday. Subsequent thereto, the employees, pursuant to an administrative order of the Public Printer, received their regular rate of pay plus pay for the holiday whenever they worked upon a legal holiday.[4]

16 11. Kelly worked eight hours on the night shift on each of the holidays specified in paragraph 5 of this stipulation. Eight hours is the regular number of hours worked on an ordinary work day. Kelly claims additional compensation is due him in an amount equal to one and one-half times the day rate for all hours worked on each of said holidays.

12. No other action has been taken on this claim in Congress or by any of the Departments, no person other than Kelly is the owner thereof or interested therein; no assignment or transfer of this claim or any part thereof, or interest therein has been made. Kelly has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided abetted, or given encouragement to rebellion against the Government.

(S.) HENRY J. FOX,
Attorney for Plaintiff.
(S.) KENDALL M. BARNES,
Attorney for Defendant.
(S.) H. G. MORISON,
Assistant Attorney General.

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[4] Administrative Order No. 39; May 28, 1946 provided:

To All Employees of the Government Office:

On and after the date of this order any employee of the Government Printing Office who is required to work on a day designated by Federal statute or Executive order as a holiday will be compensated for the time worked at his regular rate of compensation in addition to his holiday pay.

A. E. GIEGENGACK, *Public Printer.*

17 EXHIBIT A TO STIPULATION OF FACTS

Proposed Rates of Pay for Night, Sunday, Holiday, and Overtime Work in the Government Printing Office

Government Printing Office,
Office of the Public Printer,
Washington, August 30, 1924.

To all committees representing trades affected by Public Act No. 276 (the Wage Law), approved June 7, 1924, and to all other employees whose compensation may be determined by the Public Printer in accordance with the provisions of said act.

GENTLEMEN: Notice is hereby given that the Public Printer proposes to recommend or establish, as the case may be, the below stated rates of pay for night, Sunday, holiday, and overtime work by employees of the Government Printing Office who may be entitled to receive such compensation. Committees authorized to represent any trade affected by the proposed compensation are respectfully requested to submit their action on this proposal on or before September 5, 1924. It is the purpose of the Public Printer to present to the Joint Committee on Printing rates of pay for night, Sunday, holiday and overtime work that may require final action by that Committee.

The proposal as to rates of pay for night, Sunday, holiday, and overtime work is submitted at this time to all employees affected thereby in order that the Joint Committee on Printing may have an opportunity to consider such rates for the Government Printing Office as a whole, and that there may be uniformity of action as regards all employees.

18 The proposal of the Public Printer as to night, Sunday, holiday, and overtime rates is as follows:

DAY AND NIGHT SHIFTS

The regular working shift of any day or night force shall be 8 hours. Employees whose regular shift is between the hours of 6 a. m. and 6 p. m. shall be paid the respective day rate for the time actually employed. Employees whose regular shift is between the hours of 6 p. m. and 8 a. m. shall be paid the respective night rate for the time actually employed. In computing rates of pay, fractions of less than one-half cent shall be dropped and of one-half cent or more shall be added.

NIGHT RATE

Employees required to work on a regular night shift shall be paid 15 per cent in addition to the day rate for the time actu-

ally employed up to 8 hours. An employee whose regular shift consists of part day and part night hours shall be paid entirely at the rate provided for the majority of the time so employed No employe will be granted extra pay for night work for which he is allowed overtime, Sunday or legal or special holiday rates of pay.

SUNDAY RATE

Employees required to work on Sunday shall be paid 50 per cent in addition to the day rate for all the time actually employed on said Sunday: *Provided*, That employees whose regular shift begins on Saturday night shall be paid at the week night rate, and employees whose shift begins on Sunday night at the Sunday rate, for all the time actually employed on such shift.

19

HOLIDAY RATE

Employees required to work on a legal holiday or a special holiday declared by Executive order shall be paid at the day rate plus 50 per cent for all the time actually employed in addition to their gratuity pay for the holiday as provided by law; holiday rate shall apply to all hours of a regular shift beginning work on the holiday, but not to any hours of a regular shift beginning work prior to a holiday and ending on the holiday. Employees required to work more than 4 hours but not exceeding 8 hours on Saturdays on which, by the Executive order of June 13, 1924, 4 hours shall constitute a day's work, shall be paid their regular rate for time actually so employed in excess of said 4 hours, in addition to pay for 8 hours at their regular rate.

OVERTIME RATE

Employees on the day or night shifts who are required to work in excess of 8 hours in any period of 24 consecutive hours shall receive 50 per cent in addition to the regular day rate for the period of said overtime work. No employee will be granted extra pay for overtime for which he is allowed pay at the Sunday or legal or special holiday rate.

15 PER CENT EXTRA FOR NIGHT-SHIFT EMPLOYEES

It is proposed that the night employees shall be paid 15 per cent in addition to the day rate. A rate of 12½ per cent for night workers has been approved by the local Typographical Union in its scale agreement with the Washington book and job offices. The local Typographical Union has also agreed to a 10 per cent night

rate in Washington newspaper offices. Scale agreements of typographical unions throughout the country generally fix upon
20 10 per cent as the extra rate for printers employed at night in newspaper and book and job offices. Union pressmen employed in Washington book and job offices receive 15 per cent extra for night work. Many printing offices grant only 5 per cent extra to night workers.

The Bureau of Engraving and Printing pays the same rate to day and night workers. The Naval Establishment, including the Washington Navy Yard, grants civilians employed at night a flat increase of 5 cents an hour over the day rate; thus a navy-yard employee at the day rate of $1 an hour receives $1.05 an hour for night work, or only 5 per cent additional.

Accordingly, it seems evident that the proposed night rate is an adequate and liberal provision for regular night employees of the Government Printing Office. The old rate of 20 per cent was fixed by law many years ago when the basic pay was only 40 cents an hour, so the extra night pay was correspondingly small. Based on a day rate of $1 an hour, the extra night compensation of 20 per cent would be $1.60 for eight hours work or $9.60 per week in excess of the day rate for the same class of work. This is too great a difference in the pay of day and night employees for the same class of work. The commercial scale for night work averages from only $2 to $5 per week more than the day pay.

The 20 per cent night rate was provided for the Government Printing Office years ago chiefly to attract a temporary force of night workers during sessions of Congress and was in the nature of a bonus for such emergency employment. At that time little or no work was done at night except when Congress was in session.

For some years past, however, it has been necessary to
21 employ a regular night force, and undoubtedly the rapidly increasing work of the Printing Office will require a permanent night force hereafter. Therefore, as is here proposed, it is fitting that the Government Printing Office should now fix its night scale more nearly in accord with commercial scales.

Sunday, Holiday, and Overtime Rates

In proposing special rates of pay for Sunday, holiday, and overtime work, an endeavor has been made to adopt general trade customs as far as they could be made to conform to the requirements of the Government service.

The Sunday rate of 50 per cent additional to the week-day rate is the same as heretofore fixed by law and corresponds with the Sunday rate paid by the Naval Establishment and the Bureau of Engraving and Printing. The extra rate for Sunday work applies alike to day and night employees who may be required to work

on Sunday. Inasmuch as work on Sunday is in the nature of overtime, being additional to the regular hours of employment, it is believed that the compensation for Sunday work should be the same as for overtime.

Therefore, the rate proposed has been made the same for both day and night workers instead of allowing Sunday night employees to pyramid their Sunday rate on the regular week-night rate as heretofore. The one rate for Sunday work, day or night, accords with the present practice of the Bureau of Engraving and Printing and the Naval Establishment, including the Washington Navy Yard, which do not allow extra night pay to employees required to work on Sunday.

22 During the last fiscal year employees of the Government Printing Office worked 228,423 hours on Sundays and received $216,749 in compensation for such extra services. Heretofore, Government Printing Office employees required to work on legal and special holidays have been allowed only double time; that is, gratuity pay for the holiday whether they worked or not, and regular pay for the time actually employed on the holiday. The Bureau of Engraving and Printing and the Naval Establishment also grant their employees regular pay plus 50 per cent, in addition to the gratuity pay, when required to work on a legal holiday.

Time and One-Half Extra for Holiday Work

Holiday work is similar to overtime and Sunday work in requiring extra hours of labor, and it would seem proper to compensate such emergency services at the same rate, whether performed on week days, holidays, or Sundays. Accordingly, it is proposed to pay employees of the Government Printing Office for legal and Executive-order holidays, except Saturday half-holidays as hereinafter provided, at the rate of time and one-half for the hours actually employed, in addition to gratuity pay for the holiday as authorized by law.

The night rate does not apply when employees are granted extra holiday pay, which also agrees with the pay schedules of the Bureau of Engraving and Printing and the Naval Establishment. Commercial Printing offices generally pay only time and one-half for holiday work, their employees receiving no compensation for the holiday if they do not work on that day.

23 During the last fiscal year employees of the Government Printing Office worked 67,550 hours on holidays for which they received $42,047 of extra compensation.

Saturday half-holiday pay for summer months is continued as at present. The employees receive 8 hours' pay for 4 hours' work under authority of the Executive order. If required to work the full 8 hours on Saturday, the extra 4 hours' service is compensated

for at the regular per hour rate. Thus an employee working 8 hours on Saturdays which the President has designated for half-holidays, receives time and one-half therefor. Saturday night employees will be allowed the night rate for their regular shift. The overtime rate applies to all hours worked by Saturday shifts in excess of 8 hours.

Prior to the authority granted by the new wage law, ... was impossible to allow extra compensation for overtime work by employees of the Government Printing Office. Congress has now rectified this serious discrimination against Printing Office employees, and accordingly, it is proposed to pay them the customary trade rate of 50 per cent additional for work in excess of 8 hours in any period of 24 consecutive hours. Night rate will not be added to the new overtime rate, which again conforms to the rule of the Bureau of Engraving and Printing and the Naval Establishment against the pyramiding of extra-pay rates.

The overtime rate will mean a considerable increase in the pay of many employees. In the fiscal year 1924 there were 64,227 hours of week-day overtime for which employees received $44,190 extra compensation; in the preceding year, the week-day overtime amounted to 119,416 hours for which $76,188 extra compensation was paid.

UP-AND-DOWN RATING FOR TEMPORARY CHANGES

24 Employees may be transferred from one occupation or position to another within their respective trades and compensated at the rate provided therefor. If such transfers are temporary to meet the exigencies of the work, employee shall continue to receive his regular rate of pay, unless the work to which he is assigned carries a higher rate, in which event he shall receive the higher rate if so employed for 3½ or more continuous hours in any one day. If the transfer carries a lower rate of pay, the employee shall continue to receive his regular rate, unless employed at lower rate work for 8 or more continuous hours in any one day, in which event he shall receive the rate of pay provided for the work performed.

The compensation for night, Sunday, holiday, and overtime work, as decided upon by the Joint Committee on Printing in accordance with Public Act No. 276, Sixty-seventh Congress, will be made applicable to all employees of the Government Printing Office who may be entitled to such compensation.

Respectfully,

(S.) GEORGE H. CARTER,
Public Printer.

25 EXHIBIT B TO STIPULATION OF FACTS

4713 45th Street, N. W.
Washington 16, D. C.
April 23, 1948.

Mr. John J. Deviny
Acting Public Printer
United States Government Printing Office
Washington 25, D. C.

DEAR SIR:

This is to make claim for holiday pay in the amount of $223.56 for work performed on legal holidays from May 30, 1940, to July 4, 1944, inclusive.

This claim is based upon a provision in wage agreements setting wages of journeyman printers in the Government Printing Office, entered into between the Public Printer and committees representing the journeyman printers of the Government Printing Office, said wage agreements having been entered into by authority of the act of June 7, 1924 (43 Stat. 658).

On each of the following-named holidays claimant worked as a journeyman printer in the Government Printing Office the number of hours set forth:

May 30, 1940	4 hours	February 22, 1943	8 hours
January 1, 1942	8 hours	September 6, 1943	8 hours
February 23, 1942	8 hours	November 11, 1943	8 hours
September 7, 1942	8 hours	November 25, 1943	8 hours
November 11, 1942	8 hours	February 22, 1944	8 hours
November 26, 1942	8 hours	May 30, 1944	8 hours
January 1, 1943	8 hours	July 4, 1944	8 hours

The following is the pertinent provision of the wage agreement which became effective upon approval by the Congressional Joint Committee on Printing as of October 29, 1924:

26 "*Holiday rate.*—Employees required to work on a legal holiday or a special holiday declared by Executive order shall be paid at the day rate plus 50 percent for all the time actually employed in addition to their gratuity pay for the holiday as provided by law * * *"

The above-cited provision was continued in effect by the following section of the wage agreement which became effective upon approval by the Congressional Joint Committee on Printing as of July 1, 1926:

"The existing rates of pay and regulations for night, Sunday, holiday, and overtime work * * * shall continue."

Claimant's day rate of pay for the period encompassing the above-listed holidays was $1.38 per hour. His holiday rate calculated in accordance with the terms of the wage agreement was $2.07 per hour in addition to the regular hourly rate of pay.

For no part of the 168 hours worked on the stated holidays did claimant receive any compensation in addition to his regular daily pay.

Wherefore, claim is made for the sum of $223.56.

It is submitted that the cited provision of the wage agreement was in effect during the time for which claim is made for holiday pay.

No wage agreement superseding the agreement of July 1, 1926 was consummated until August 13, 1944. (It will be noted that no recovery is sought for work performed on holidays subsequent to that date.) Therefore, unless superseded by statute, the holiday-pay provision remained in full force and effect during the time covered by this claim.

27 In the act of June 30, 1932 (Public Law 212, 72d Cong.) we find that holiday pay was limited as follows, under the heading "Overtime compensation":

> "Sec. 211. (a) During the fiscal year ending June 20, 1933—
> "(1) No officer or employee of the Government shall be allowed or paid a higher rate of compensation for overtime work (either day or night) or for work on Sundays and holidays."

This section was continued in effect by section 4 (a) of the act of March 3, 1933 (Public Law 428, 72d Cong.). But it was repealed by section 4 (d) of the act of March 20, 1933 (Public Law 2, 73d Cong.).

Thus, the holiday-pay provision of the wage agreement, having been temporarily suspended, became again effective as of April 1, 1933.

Claimant is, of course, not unaware of the Comptroller General's decision of August 23, 1938 (18 Comp. Gen. 191), that because of Public Resolution No. 127, June 29, 1938 (52 Stat. 1246) employees of the Government Printing Office working on a 5-day, 40-hour-week basis who work on a holiday within the regular tour of duty are entitled only to 1 day's pay, and not to pay for the holiday and in addition for the time actually worked on the holiday.

Claimant contends that as to him this ruling is in error—that his rate of pay for work performed on holidays was set by a wage agreement and said public resolution does not by its terms or by any logical inference of congressional intent prohibit or make ineffective a provision of a wage agreement relating to extra compensation for holiday work, which said provision was in force prior to the passage of the resolution.

28 In fairness to the Comptroller General it must be stated that it does not appear from a careful reading of his decision that he was aware of or had access to the wage agreement referred to.

The resolution on which the Comptroller General's decision was made is as follows:

> "Hereafter, whenever regular employees of the Federal Government, whose compensation is fixed at a rate per day, per hour, or on a piece-work basis, are relieved or prevented from working solely because of the occurrence of a holiday, such as New Year's Day, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Christmas Day, or any other day declared a holiday by Federal statute or Executive order, or any day on which the departments and establishments of the Government are closed by Executive order, they shall receive the same pay for such days as for other days on which an ordinary day's work is performed.
>
> "Sec. 2. The joint resolution of January 6, 1885 (U. S. C., title 5, sec. 86), and all other laws inconsistent or in conflict with the provisions of this Act are hereby repealed to the extent of such inconsistency or conflict."

The joint resolution of January 6, 1885, "repealed to the extent of such inconsistency or conflict" is as follows:

> "The employees of the Navy Yard, Government Printing Office, Bureau of Printing and Engraving, and all other per diem employees of the Government on duty in Washington, or elsewhere in the United States, shall be allowed the following holidays, to wit: The 1st day of January, the 22d day of February, the 4th day of July, the 25th day of December, and such days as may be designated by the President as days for national thanksgiving, and shall receive the same pay
> 29 as on other days." (23 Stat. 516.)

Note the inconsequential difference in the wording of the two statutes:

Employees of the category including claimant—

> (1) "shall be allowed (setting forth holidays) and shall receive the same pay as on other days." (23 Stat. 516.)

(2) whenever relieved or prevented from working solely because of the occurrence of a holiday—

> "shall receive the same pay for such days as for other days on which an ordinary day's work is performed." (Joint resolution of June 29, 1938.)

Neither statute specifically grants extra pay for work actually performed on holidays, nor, on the other hand, does either statute specifically forbid such pay, assuming, of course, that such pay was called for in a wage agreement legally arrived at. And, by reason of a wage agreement valid under the former statute, claimant did receive extra pay for work performed on holidays prior to June 29, 1938.

If the Comptroller General had been familiar with the holiday-pay provision of the wage agreement of July 1, 1926, upon what basis could he have ruled that there was a difference in meaning between the phrase "shall receive the same pay as on other days" and "shall receive the same pay for such days as for other days on which an ordinary day's work is performed"—a difference in meaning such that under the former phrase a legal provision in a wage agreement requiring extra pay for work performed on holidays was superseded?

Clearly there is no language in the joint resolution of June 29, 1938, specifically superseding and making ineffective an agreement in force at the time of its enactment relating to extra pay for work performed on holidays.

And a review of the legislative history of the joint resolution of June 29, 1938, will reveal that there is absolutely no basis for reading such an interpretation into the resolution.

The said joint resolution was a House Civil Service Committee substitute for a resolution to pay per diem employees of the Federal Government for the Executive-order holiday of December 24, 1937, since there was no statutory provision authorizing pay to such employees for holidays declared by Executive order.

The substitute measure was suggested by the Civil Service Commission to give statutory authority for such payments as a general practice and remove the discrimination against per diem employees of the Federal Government.

In House Report No. 2683, Seventy-fifth Congress, it is stated:

> "The President by Executive Order No. 7763 of December 6, 1937, excused Federal employees from duty on December 24, 1937 (Christmas Eve Day). The accounting authorities of the Government have held that, in the absence of specific legislation, regular employees whose compensation is fixed at a rate per day, per hour, or on a piece-work basis lose pay for that day. This joint resolution was originally introduced to give those employees, who lost their pay for the holiday granted by the Executive order, their compensation for that day. The resolution was referred to the Civil Service Commission and the Bureau of the Budget for consideration and

report and both reported favorably and suggested the
31 amendment as outlined above in order to have a permanent law to take care of such similar situations that may arise in the future."

The letter of the Civil Service Commission, included in the printed report, reads as follows:

"United States Civil Service Commission,
Washington, D. C., February 15, 1938

"Hon. Robert Ramspeck,
"Chairman, Committee on the Civil Service,
"House of Representatives.

"Dear Mr. Chairman:

"In further response to your request of January 24, for report on House Joint Resolution 551, providing compensation for certain employees for December 24, 1937, the Commission has the honor to advise you that the President by Executive Order No. 7763 of December 6, 1937, excused Federal employees from duty on December 24, 1937. It is believed that the President had in view that the benefits of the holiday be accorded to all classes of employees to the greatest extent possible. The accounting authorities, however, have held that in the absence of specific legislation the regular employees of the Federal Government whose compensation is fixed at a rate per day, per hour, or on a piece-work basis lose pay for that day. This has resulted in discrimination against these groups of Federal employees.

"The proposed joint legislation provides for the payment of compensation to these employees to cover the single day, December 24, 1937; but there is the broader question involved of securing statutory authority for such payments as a general practice and thus obviate the necessity for special resolutions by Congress. Such a resolution, for example, was required last year to provide payment for these same classes
of employees in Washington, D. C., who were excused
32 from duty on January 20, 1937, the date of the inauguration of the President.

"It is believed that general legislation in the following phraseology would give permanent statutory authority for payments under the circumstances indicated:

"'Hereafter, whenever regular employees of the Federal Government, whose compensation is fixed at a rate per day, per hour, or on a piece-work basis, are relieved or prevented from working solely because of the occurrence of a holiday.

such as New Year's Day, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day, or any other day declared a holiday by Federal statute or Executive order, or any day on which the Departments and establishments of the Government are closed by Executive order, they shall receive the same pay for such days as for other days on which an ordinary day's work is performed.

"'Sec. 2. The joint resolution of January 6, 1885 (U. S. C., Title 5, sec. 86), and all other laws inconsistent or in conflict with the provisions of this Act are hereby repealed to the extent of such inconsistency or conflict.'

"The Commission is advised by the Bureau of the Budget that the joint resolution and the proposed joint resolution are not contrary to the program of the President.

"By direction of the Commission.

"Very respectfully,

"Harry B. Mitchell, President."

(The full report of the Civil Service Committee of the House of Representatives is attached hereto as Exhibit A.)[5]

33 Also one will look in vain to the debate in the House of Representatives for any "intention of Congress" to abrogate by this resolution a provision of a legal wage agreement setting forth the rate of extra compensation for work performed on holidays.

In the Congressional Record of June 15, 1938 (vol. 83, No. 8, p. 9466) is found:

"Mr. Ramspeck. This covers the lowest paid group of employees in the Government services. It is only those who work on a per diem basis. For instance, last Christmas Eve the President excused all Government employes from rendering any service. His Executive order, of course, applied to every employee in the Government service. Those who are working on a monthly salary got their pay for Christmas Eve, but those who work on a per diem were forced to take the day off, and they lost the day's pay. This is simply to correct that situation.

* * * * * *

"Mrs. Rogers of Massachusetts. This simply prevents an unintentional discrimination.

"Mr. Ramspeck. That is correct. The per diem employees are unintentionally discriminated against."

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[5] Exhibit A referred to herein was attached to Stuart Kelly's letter, and has been omitted from this stipulation.

The resolution passed the Senate without debate.

Since, as has been demonstrated, the provision of the wage agreement upon which claim is based was not superseded by any subsequent wage agreement during the period encompassing the holidays above set forth, and since there is no statutory prohibition of extra compensation in accordance with such provision, it is respectfully submitted that this claim should be granted.

Very truly yours,

STUART KELLY,
Proof Section, Night.

34 ARGUMENT AND SUBMISSION OF CASE

On March 5, 1951, the case was argued and submitted on merits by Mr. Henry J. Fox, for plaintiff, by Mr. Kendall M. Barnes, for defendant.

35 **Special Findings of Fact, Conclusion of Law and Opinion of the Court by Madden, J., Dissenting Opinion by Whitaker, J., and Jones, Chief Judge**—Filed April 3, 1951

Mr. Henry J. Fox for the plaintiff. *Messrs. Posner, Berge, Fox* and *Arent* were on the briefs.

Mr. Kendall M. Barnes, with whom was *Mr. Acting Assistant Attorney General Newell A. Clapp*, for the defendant.

The Court, upon a stipulation of facts entered into by the parties, and the argument and briefs of counsel, makes the following

SPECIAL FINDINGS OF FACT

1. At all times material hereto plaintiff Kelly has been and is now a citizen of the United States of America.

2. During all or part of the period from September 1, 1943, to October 15, 1945, Kelly was regularly employed as a journeyman printer by the Government Printing Office, Washington, D. C.

3. Kelly was employed by the Public Printer. His compensation was fixed by a wage agreement negotiated by the Public Printer and a committee of employees representing the journeymen printers of the Government Printing Office. This wage agreement was approved by the Joint Committee on Printing, and originally became effective October 27, 1924. It was entered into and approved under the authority of and pursuant to the Act of June 7,
36 1924, 43 Stat. 658, 44 U.S.C. Section 40. It was amended from time to time thereafter.

4. The wage agreement and amendments thereto referred to in Finding 3, at all times material hereto contained the following

provisions relating to the rates of compensation for work performed on night shifts, Sundays, holidays, and during overtime hours:

Night rate. Employees required to work on a regular night shift shall be paid 15 per cent in addition to the day rate for the time actually employed up to 8 hours. An employee whose regular shift consists of part day and part night hours shall be paid entirely at the rate provided for the majority of the time so employed. No employee will be granted extra pay for night work for which he is allowed overtime, Sunday, or legal or special holiday rates of pay.

Sunday rate. Employees required to work on Sunday shall be paid 50 per cent in addition to the day rate for all the time actually employed on said Sunday: *Provided*, that employees whose regular shift begins on Saturday night shall be paid at the week night rate, and employees whose shift begins on Sunday night at the Sunday rate, for all the time actually employed on such shift.

Holiday rate. Employees required to work on a legal holiday or a special holiday declared by Executive Order shall be paid at the day rate plus 50 per cent for all the time actually employed in addition to their gratuity pay for the holiday as provided by law; holiday rate shall apply to all hours of a regular shift beginning work on the holiday, but not to any hours of a regular shift beginning work prior to a holiday and ending on the holiday. Employees required to work more than 4 hours but not exceeding 8 hours on Saturdays on which, by the Executive Order of June 13, 1924, 4 hours shall constitute a day's work, shall be paid their regular rate for time actually so employed in excess of said 4 hours, in addition to pay for 8 hours at their regular rate.

Overtime rate. Employees on the day or night shifts who are required to work in excess of 8 hours in any period of 24 consecutive hours shall receive 50 per cent in addition to the regular day rate for the period of said overtime work. No employee will be granted extra pay for overtime for which he is allowed pay at the Sunday or legal or special holiday rate.

37 5. During the period from September 5, 1943, to February 23, 1945, Kelly was required to and did work eight hours on each of the following holidays:

September 6, 1943	Labor Day
November 11, 1943	Armistice Day
November 25, 1943	Thanksgiving Day
February 22, 1944	Washington's Birthday
May 30, 1944	Memorial Day
July 4, 1944	Fourth of July
September 4, 1944	Labor Day
November 23, 1944	Thanksgiving Day
January 1, 1945	New Year's Day
February 22, 1945	Washington's Birthday

6. For work performed on the holidays specified in Finding 5, Kelly received only the same rate of pay as for work performed on ordinary work days. On the holidays falling between September 6, 1943, and July 4, 1944, both dates inclusive, the day rate for work of the type performed by Kelly was $1.38 per hour, and the night rate was $1.584 per hour. Kelly, who worked on the night shift, was paid at the rate of $1.584 per hour for all time worked on such holidays. On the holidays recited in Finding 5 which occurred subsequent to July 4, 1944, the day rate for work of the type performed by Kelly was $1.52 per hour, and the night rate was $1.75 per hour. Kelly also worked on the night shift on these holidays, and was paid at the rate of $1.75 per hour for such work.

7. On April 23, 1948, Kelly submitted a claim[2] to the Acting Public Printer requesting that he be allowed additional compensation for certain holidays among those set forth in finding 5. A true copy of this claim is attached to the stipulation filed herein, and is made a part hereof by reference. Thereafter, this claim was forwarded to the Comptroller General's Office.

8. On March 28, 1949, the Comptroller General issued a Settlement Certificate on Claim No. 1925381, Kelly's claim, in
38 which he disallowed the claim and certified that no balance was due him from the United States. A true copy of the Settlement Certificate is attached to the petition herein, and is incorporated herein by reference.

9. Upon the enactment of section 23 of the act of March 28, 1934 (40-hour week law), the Public Printer on April 9, 1934, requested

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[2] No other plaintiff filed a claim for additional compensation for work on holidays prior to the petition in this case. Kelly's claim was submitted by himself in his own behalf and did not purport to represent any other claimant or plaintiff in this action.

a decision from the Comptroller General of the United States on the following question:

> Under authority of act of June 7, 1924 (U. S. C., title 44, sec. 40), time heretofore actually worked on Sundays and legal holidays has been considered as overtime and paid at time and one-half rate. In the application of section 23, *supra*, is such time to be considered as overtime regardless of whether or not 40 hours has been worked in the week concerned, or is such time worked on Sundays and legal holidays a part of the 40 hours to be worked in one week before any overtime may be paid?

In his reply (13 Comp. Gen. 295), the Comptroller General on April 23, 1934, stated in material part:

> The legal holidays mentioned in the act of January 12, 1895 (28 Stat. 607), should be included as a part of the 40-hour week for employees of the Government Printing Office (12 Comp. Gen. 21; decision of January 25, 1934, A-35169). Employees who are not required to work on said holidays are nevertheless entitled to their regular compensation for the day, and employees not paid on an annual basis, who are required to work on said holidays, are entitled for the time worked on such days, to their regular rate of compensation (not "time and one-half") in addition to the regular pay for the holidays.[3]

Thereafter, and until September 5, 1938, employees of the Government Printing Office who were required to work on a legal holiday were paid for the number of hours worked at their regu-
39 lar rate of compensation, plus pay for the holiday.

10. After the enactment into law of Public Resolution 127, approved June 29, 1938, the Public Printer on August 15, 1938, re-

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[3] The Act of April 16, 1880, 21 Stat. 304, provided that employees of the Government Printing Office should receive pay for five specified holidays whenever they fell on a regular work day. Commencing with the Act of January 12, 1895, per diem, per hour and piecework employees of the Government Printing Office received pay for eight specified holidays regardless of whether they fell on a regular work day or on a non-work day. If such employees worked on one of the specified holidays, they received their regular rate of pay plus the holiday pay. Subsequent to the 1924 wage agreement, until the Comptroller General's decision in 1934 (13 Comp. Gen. 295), such employees received pay for holidays when they did not work; whenever they worked on such a holiday, they received one and ½ times the day rate for all hours of work plus the holiday pay.

quested a decision from the Comptroller General on the following question:

> September 5 next is a legal holiday. Several employees in this office will be required to work on that day. Shall they be paid for the holiday—eight hours—and, in addition for the time actually worked at their rate of compensation? (See Comp. Gen. 13-295.)

The Comptroller General on August 23, 1938, replied as follows (18 Comp. Gen. 191):

> It is understood from question No. 2 that September 5, Labor Day, is within the regular tour of duty of 40 hours per week. Whether the employees work 8 hours or less on that day they will be entitled only to 1 day's pay—not to pay for the holiday and in addition for the time actually worked on the holiday at their regular rates of pay. The cited decision has been rendered inoperative by Public Resolution of June 29, 1938, to this extent.

In accordance with this decision, employees of the Government Printing Office required to work on a legal holiday during the period June 29, 1938 to May 28, 1946, inclusive, received pay for 1 day only and no holiday pay in addition to the pay for the time actually worked on the holiday. Subsequent to May 28, 1946, the employees, pursuant to an administrative order of the Public Printer, received their regular rate of pay plus pay for the holiday whenever they worked upon a legal holiday.[4]

11. Kelly worked eight hours on the night shift on each of the holidays recited in Finding 5. Eight hours is the regular number of hours worked on an ordinary work day. Kelly claims additional compensation is due him in an amount equal to one and one-half times the day rate for all hours worked on each of said holidays.

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[4] Administrative Order No. 39; May 28, 1946, provided:

To All Employees of the Government Printing Office:

On and after the date of this order any employee of the Government Printing Office who is required to work on a day designated by Federal statute or Executive order as a holiday will be compensated for the time worked at his regular rate of compensation in addition to his holiday pay.

A. E. GIEGENGACK,
Public Printer.

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiff is entitled to recover.

The entry of judgment will be suspended to await the filing of a stipulation of the parties showing the amount to which he is entitled.

Opinion

Madden, *Judge*, delivered the opinion of the Court:

This is a suit brought by 614 employees of the Government Printing Office to recover additional compensation for work performed by them on holidays during the period from September 1, 1943 to October 15, 1945. Pursuant to Rule 9 (a) of the Court, the parties have stipulated the facts as to one of the plaintiffs only, John Stuart Kelly, and have further stipulated that the decision on Kelly's claim will be determinative of all common questions of law and fact involved in the claims of the 613 other plaintiffs.

If one is paid by the year, or the month or the week, and is fortunate enough to have a holiday, it does not reduce the amount of his pay check. But if he is paid by the day or the hour, the natural consequence of his not working on a holiday is that he gets paid for one less day than he would have been paid for if he had worked on the holiday. This normal result can be changed by agreement of the employer and the employees, or by law. It is frequently provided in union agreements with employers that workmen who are paid by the day or the hour should have certain holidays off, but should be paid as if they had worked. Under such an agreement, the workman receives as much pay at the end of a week in which there was a holiday as he receives at the end of a week in which there was no holiday.

The Government has both kinds of employees, those, mostly white collar employees, who are paid by the year, and craftsmen who are paid by the day or the hour. As to the per annum
41 employees, when by law certain days were made holidays, their pay was not affected. But the per diem and per hour employees lost their wages for the day off, until special provision was made that they should be paid for it.

By the Act of April 16, 1880, 21 Stat. 304, it was provided that employees of the Government Printing Office should be paid for five named holidays provided other Government employees were paid for those days. The proviso seems to have been interpreted to mean "if the holiday fell on a day which would otherwise have been a working day." The Joint Resolution of January 6, 1885, No. 5, 23 Stat. 516, as amended by the Joint Resolution of February

23, 1887, No. 6, 24 Stat. 644, 5 U. S. C. 86, granted five named holidays to all *per diem* employees of the Government, and said that the employees should "receive the same pay as on other days". The Act of January 12, 1895, C. 23, Section 46, 28 Stat. 607, 44 U.S.C. 44 granted eight named holidays "with pay" to employees of the Government Printing Office. The parties have stipulated that, beginning with the Act of 1895, Government Printing Office employees were paid for these holidays whether the holidays fell on what would otherwise have been a work day or not. This fact is important in a relation which will appear hereinafter. The parties have further stipulated that, apparently beginning about 1895, if a Government Printing Office employee worked on a holiday, he received a regular day's pay in addition to the holiday statutory pay. This administrative construction of the 1895 Act was confirmed by the Comptroller of the Treasury in 1901, 8 Comp. Treas. 322, and in 1906, 13 Comp. Treas. 40. This Court, in a dictum in *Adams* v. *United States*, 42 C. Cls. 191, 212, in 1907 agreed with those rulings.

The practice just recited was followed until October 27, 1924, when, in a wage agreement negotiated between the Public Printer, who was the head of the Government Printing Office, and a committee of the employees, it was provided that employees required to work on a legal holiday should be paid at time and one-half the day rate in addition to their "gratuity pay" for the holiday as provided by law. The only change effected by the agreement was the addition of the half time to the straight time which the employees were already receiving when they worked on a holiday, in
42 addition to the statutory pay for the holiday which they had been receiving, and continued to receive, whether they worked or not. The word "gratuity" used in the agreement was inaccurate. It was no more a gratuity or tip to these employees than it is to any other employee, public or private, to have a holiday off without reduction of his pay. It is a part of what he agreed to, or of what the law gives him, and he is as much entitled to it as he is to the rest of his pay.

The 1924 agreement was adhered to until 1934, when, under a ruling of the Comptroller General, it was departed from by the Government in a way prejudicial to the employees, which departure constitutes one branch of the claim involved in this case, and will be discussed hereinafter. At the moment we merely say that, beginning in 1934, the practice went back to what it was before 1924, that is, that the employee who worked on a holiday was paid straight time for his work, in addition to the statutory holiday pay which he would have received even if he had not worked.

On December 6, 1937, the President, by Executive Order No. 7763, excused all Federal employees from work on December 24,

1937. Employees who had per annum salaries were, of course, paid their salaries without deduction for that day off. But employees paid by the day received no pay for that day, so the Comptroller General ruled, because that day was not one of the eight holidays named in the statute giving such employees holidays with pay. A House Joint Resolution, No. 551, was introduced to provide that per diem employees who had not worked on December 24, 1937, should be paid. The House Committee on the Civil Service requested the comments of the Civil Service Commission on the proposed legislation. The reply of the President of the Commission is quoted in the report of the House Committee. H. R. No. 2683, 75th Cong., 3d Sess. 5 (1938). His reply suggested that, instead of enacting special legislation to pay employees each time that a holiday was declared by Executive Order, a permanent statute should provide that, in addition to the holidays named in existing statutes, any day declared a holiday by Executive Order should be a paid holiday for all Federal employees whose compensation is fixed on a per diem, per hour, or piece-work basis.

43 The House Committee report referred to above also quoted the letter decision which the Acting Comptroller General had given to the Secretary of the Navy on December 20, 1937, to the effect that per diem employees could not, under existing legislation, be paid for the December 24, 1937, holiday proclaimed by Executive Order. In that decision it was pointed out that such employees, under existing legislation, were often paid for holidays which occurred on Saturdays or Sundays when the employees would not have worked or been paid if the day had not been a holiday. In that regard the per diem employees were treated better than per annum employees, since, although they worked only the same number of days in such weeks as the per annum employees, they drew one more day's pay in such weeks than they did in other weeks. In other words, the more occurrence of the holiday, although they did not work on the holiday, increased their pay for the week.

The letter from the Civil Service Commission, referred to above, contained a suggested text for the new legislation, which text was adopted verbatim by the House Committee, and became Public Resolution No. 127, 75th Cong., 3d Sess. approved June 29, 1938; 52 Stat. 1246; 5 U. S. C. 86a, reading as follows:

> Hereafter, whenever regular employees of the Federal Government, whose compensation is fixed at a rate per day, per hour, or on a piece-work basis, are relieved or prevented from working solely because of the occurrence of a holiday, such as New Year's Day, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day, or any other day declared a holiday by Federal statute

or Executive order, or any day on which the Departments and establishments of the Government are closed by Executive order, they shall receive the same pay for such days as for other days on which an ordinary day's work is performed.

SEC. 2. The joint resolution of January 6, 1885 (U. S. C., Title 5, sec. 86), and all other laws inconsistent or in conflict with the provisions of this Act are hereby repealed to the extent of such inconsistency or conflict.

As shown in Finding 10, on August 15, 1938, the Public Printer requested the opinion of the Comptroller General as to whether employees who would be required to work on September 5,
44 Labor Day, one of the legal holidays named in the statute, might be paid for the day, in addition to the holiday pay that they would receive if they did not work. The Comptroller General on August 23, replied in the negative, 18 Comp. Gen. 191, saying that the former practice was forbidden by the June 29, 1938, legislation. He said that employees required to work on a holiday were not "relieved or prevented from working solely because of the occurrence of the holiday" within the meaning of the 1938 statute. Pursuant to the Comptroller General's ruling, the plaintiffs, employees in the Government Printing Office, who have been required to work on holidays have received exactly the same pay as those who were not required to work.[1] This is obviously surprising. Our problem is to determine whether it is lawful.

One has immediate doubts as to whether Congress, in 1938, intended to take away from this class of Government employees these rights which they had enjoyed at least since 1895. And when one examines the origin and purpose of the legislation, he finds not the remotest intimation of any such intent. The resolution as originally introduced provided merely that per diem employees should be paid for the December 24, 1937, special holiday. It was amended so that it would serve as permanent legislation for all such occasions. The Civil Service Commission and the House Committee in enlarging the scope of the resolution obviously had noted the Comptroller General's comment, quoted in the committee report, that the existing legislation had been so interpreted as to give employees pay for a holiday coming on a day when they would not have worked anyway. To prevent that unduly generous treatment, the language "whenever * employees * * * are relieved or prevented from working solely because of the occurrence of a holiday" was inserted. The words were apt for that purpose. Hence we are not asked by the plaintiffs to disregard,

[1] But see note 4 to Finding 10.

or nullify, words of a statute on the ground that Congress used them inadvertently. They had a purpose and were, for that purpose well chosen. We are asked only to hold that they should not be given an additional application, which, taken literally,
45 they could receive, when all the indications are that they were not meant to have it.

With regard to its per diem and per hour employees, the so-called wage board employees, the Government is in competition with private employers, and attempts to keep its wages and working conditions in step with those in private enterprise. It is completely unthinkable that the owner of a printing shop could, by practice, or by contract, maintain the policy as to holiday pay which the Government here seeks to attribute to Congress. Such an employer might, and many employers did, in 1938, have a policy of not paying for holidays not worked. If the holiday was worked, it was paid for. Some such employers then, and most of them now have contracts with their employees providing for paid holidays, but in all such contracts there is a provision that if the holiday is in fact worked, it will be paid for again, usually at premium pay, and in addition to the holiday pay. But in no case which we have heard of, or can imagine, could an employer maintain a practice whereby an employee who worked on a holiday received merely the same pay as one who did not work.

This being the situation, we think that the administrative officers of the Government and the courts have no duty, and indeed no right, to attribute to Congress an intention which, it is morally certain, Congress did not have, by giving to words which Congress used for one obvious purpose, an additional application which, taken literally, they might support. The evil which Congress meant to cure by the words it used, it cured. The additional effect contended for by the Government would destroy a practice which no one had ever even intimated to be an evil, and which responsible officials had, for more than forty years regarded as just and necessary.

The Government suggests that the fact that per annum employees at that time, received no extra pay when they were required to work on a holiday was a discrimination, which the Government's interpretation would eliminate. But that difference had existed for some forty-five years, no mention had been made of it in connection with this legislation, and there is no basis whatever for thinking that Congress intended to treat it. It was apparently, a recognized difference between the status of a per annum
46 employee with his relatively secure tenure, and a per diem craftsman.

We conclude, therefore, that the Public Resolution of June 29, 1938, did not deny to the plaintiff Kelly his right to holiday pay in addition to the pay earned by him when he worked on holidays.

From what we have said it will be gathered that we do not agree with the Government's argument that the repealer provision of the 1938 Resolution, in some way not quite clear to us, supports the Government's interpretation of the Resolution.

We now consider the second branch of the plaintiff Kelly's claim. It involves the application of Section 23 of the Act of March 28, 1934, 48 Stat. 522 which reads as follows:

> The weekly compensation, minus any general percentage reduction which may be prescribed by Act of Congress, for the several trades and occupations, which is set by wage boards or other wage-fixing authorities, shall be re-established and maintained at rates not lower than necessary to restore the full weekly earnings of such employees in accordance with the full-time weekly earnings under the respective wage schedules in effect on June 1, 1932: *Provided*, That the regular hours of labor shall not be more than forty per week; and all overtime shall be compensated for at the rate of not less than time and one-half.

We have had occasion to consider Section 23 in earlier cases. *Townsley* v. *United States*, 101 C. Cls. 237, affirmed 323 U. S. 557; *Hearne* v. *United States*, 107 C. Cls. 335; *Gray* v. *United States*, 110 C. Cls. 661; *Poggas* v. *United States*, No. 47652, decided December 5, 1950, rehearing denied March 6, 1951. A reading of this Section indicates that it was intended to improve the conditions of working men, and, no doubt, it has had that result. Consideration of the litigation concerning it makes it even clearer that it has improved the standard of living of many lawyers.

As we have said, the Public Printer, as he had the power to do under the Act of June 7, 1924, 43 Stat. 658; 44 U. S. C. 40, made an agreement, effective October 27, 1924, with the employees in the Government Printing Office which provided that employees required to work on a holiday should receive time and one-half for the time worked, in addition to their "gratuity pay" for the holiday as provided by law. The employees were so paid until on March 28, 1934, Section 23 was enacted. On April 9,
47 1934, the Public Printer requested an opinion from the Comptroller General as to whether the additional half time could continue to be paid. The Comptroller General replied, 13 Comp. Gen. 295 in the negative, saying, in effect, that the provision in Section 23, that time worked beyond 40 hours in a week should be overtime and should be paid for at time and one-half meant that no time within the forty hours could be paid for at more than straight time, even if it was worked on a holiday.

We think the Comptroller General's interpretation was erroneous. The time and one-half pay for work on holidays had no relation

to overtime. It was penalty pay in the sense that it would discourage the employer from unnecessarily requiring work on holidays, and was premium pay in the sense that it rewarded the employee for giving up a holiday that his neighbors were enjoying. In the former respect it resembled overtime, and in the latter respect it resembled premium pay for work on a night shift, or on Sunday, when most people are not working. But it was not overtime in the sense in which that word is used in industry, or in any sense in which it has been consistently used by Congress.

We do not understand, and no explanation has been offered, why, if Section 23 struck down the provision of the 1924 agreement as to holiday pay, it did not likewise invalidate the provision of the same agreement for 15% additional premium pay for work at night, within the regular forty-hour week. This was "overtime", if the word is to be stretched, just as much as the premium holiday pay was, yet it was regarded as unobjectionable. See 23 Comp. Gen. 962.

In the Act of January 13, 1883, C. 23, 22 Stat. 402, it was provided:

> That, for extra work, ordered in emergencies and performed on Sundays or legal holidays, or between the hours of midnight and eight antemeridian, excepting that done by regular organized night forces, the Public Printer is hereby authorized to pay such extra prices as the custom of the trade and the justice of the case may require.

Congress there authorized the Public Printer to award premium pay in a variety of situations, for work done at unusual times. There was no thought or mention of overtime, and, indeed,
48 in 1883 there was probably no custom in Government or industry to pay any increased rate for work beyond regular daily or weekly hours.

In the Act of February 13, 1911, as amended, 41 Stat. 402 C. 61, 19 U. S. C. 267, Congress referred to overtime services of Customs inspectors and other Customs employees and then went on to define such services as including night, Sunday, and holiday time. The Act of March 2, 1931, 46 Stat. 1467, relating to immigration inspectors used the word overtime in the same way, but defining what was meant.

In the Act of March 4, 1925, C. 549, § 1, 43 Stat. 1300, 44 U. S. C. 75 it was provided:

> Employees in the office of the Superintendent of Documents may be paid compensation for night, Sunday, holiday, and overtime work at rates not in excess of additional compensation for such work allowed other employees of the Govern-

ment Printing Office under the provisions of section 40 of this title.

Here it is plain that Congress did not regard holiday rates as overtime rates. But the fact that Congressional usage of the word has not been entirely consistent is no ground for assuming that in 1934, in aiming at an entirely different objective, Congress succeeded in striking down an arrangement which had been in effect for ten years, had not been criticized, and was not even remotely in the mind of Congress when it enacted Section 23.

On December 12, 1945, the Secretary of the Navy addressed an urgent plea to the Comptroller General, on behalf of the War and Navy Departments, saying that "inability to authorize a premium rate for holiday work has very seriously impaired the efficiency" of certain facilities of the services mentioned in the letter. In response the Comptroller General, on February 7, 1946, 25 Comp. Gen. 584, restudied the question. He recognized, p. 589, that a distinction between overtime pay and premium pay for holiday work had been maintained by commercial industry, and that such classes or categories of pay had been considered co-equal with, and independent of, each other. But, he thought, Congress had not made this distinction until it enacted the Federal Employees Pay Act of 1945, 59 Stat. 295, 296, 298, where it provided in separate sections, 201 and 302 for overtime and holiday pay
49 respectively. The 1945 Act had no application here pertinent to employees such as the plaintiff Kelly. See Section 102 (c). But the Comptroller General concluded that the recognition by Congress in the 1945 Act, though in an unrelated connection, of the difference between overtime pay and premium pay for holidays justified a new interpretation of the 1934 Act, the new interpretation being effective in 1945.

This process of interpretation, whereby the meaning of a 1934 statute is changed, only prospectively, in 1945 because Congress showed in 1945 that it then knew the correct meaning of words which it had used in 1934 is unusual. It would be preferable to infer that since Congress showed in 1945 that it knew the meaning of the words it had used in 1934, it had known it all the time, and that any mistake as to the meaning had not been that of Congress, but of the person who read the words and attributed the mistaken meaning to them. We conclude that Section 23, when enacted, and thereafter, had nothing to do with premium pay for holidays, and did not invalidate the agreement which the Public Printer had with his employees.

The Government urges that Kelly's right to sue is barred by laches. We think not. In *Hearne* v. *United States*, 107 C. Cls. 335, 400, this Court rejected a similar contention in a suit by an em-

ployee of the Panama Canal under Section 23. We said there that, in the confusion of administrative rulings with regard to the meaning of Section 23, it would be unfair to require a workman to know, at his peril, his statutory rights when the responsible officials of the Government could not see them clearly. In this case the doctrine of laches seems peculiarly inapplicable, since only holiday pay is involved, and it is hardly possible that the Public Printer could have avoided, to any substantial degree, the holiday work, even if he had known that the work would cost more than he supposed it would.

The plaintiff Kelly, having already received the equivalent of his statutory holiday pay, is entitled to recover, pursuant to the 1924 agreement, one and one half times the day rate for the holidays on which he worked. Entry of judgment will be suspended to await the filing of a stipulation of the parties showing the exact amount to which the plaintiff is entitled.

It is so ordered.

HOWELL, *Judge*; and LITTLETON, *Judge*, concur.

WHITAKER, *Judge*, dissenting:

I cannot agree that plaintiff is entitled to two and one-half times his regular pay for work done on holidays. I agree that Section 23 of the Act of March 28, 1934, did not affect these workers' right to the day rate plus 50 percent for all holiday work; but I cannot agree they are also entitled to holiday gratuity pay. Their rights are governed by Public Resolution 127, approved June 29, 1938 (52 Stat. 1246), and this resolution gives them gratuity pay only when they are "relieved or prevented" from working on a holiday. It does not give them gratuity pay when they do work.

I conceive it to be our duty to abide by what Congress said and not by what we may think it meant to say. Where the language of an act is ambiguous, courts may have recourse to things extraneous of that language to determine the congressional intent; but where the language is plain, there is no warrant to go beyond it in order to show that Congress did not really mean what it said. Where the words used may mean one thing or another, then we may go behind them to ascertain which of the meanings was actually intended. But where language is susceptible of only one meaning, that meaning must be ascribed to it, even though it may seem strange to us that Congress should have had such an intent.

I think the 1938 resolution is clear and unambiguous and must be taken to mean just what it says. Under it these workers are entitled to receive holiday gratuity pay only when "relieved or prevented from working solely because of the occurrence of a holiday * * *." 52 Stat. 1246. Since these employees were not prevented or relieved from working on the holidays involved here, but

on the contrary they worked on those days, they are not entitled to the gratuity pay in addition to holiday premium pay. The wage agreement provided that they were to receive the day rate plus 50 percent for holiday work "in addition to their gratuity pay
51 for the holiday as provided by law"; but after June 29, 1938, gratuity pay was no longer provided by law for workers who actually worked on holidays. They were, however, still entitled to time and one-half, under the wage agreement.

The Resolution of 1938 was intended to correct the situation arising from the President's order excusing Federal employees from work on December 24, 1937. The Comptroller General had ruled that per diem employees could not be paid for that day because it was not one of the holidays specified by existing statutes for which an employee was entitled to gratuity pay. An Act was introduced to give them gratuity pay for that day only, to wit, December 24, 1937, but it was suggested by the Civil Service Commission that it would be better to pass an act applying to all holidays. A draft of such an act was enclosed in its communication to Congress. Congress adopted the suggestion and incorporated it in Public Resolution 127. This resolution gave gratuity pay only for holidays on which employees did not work.

The intention of the first of these resolutions passed in 1885 was to give per diem employees a day's pay for a holiday. Whereas employees paid on an annual basis received their regular pay whether they worked on a holiday or not, per diem employees did not. The original resolution was intended to put per diem workers on a parity with per annum employees. It was not intended to prefer them over per annum employees. A per annum employee who worked on a holiday received no extra compensation therefor.

The Resolution of 1938 carried out the intent of the original resolution and made it plain that per diem employees were entitled to gratuity pay only when they did not work on a holiday.

I do not agree that the congressional intention was different from the congressional expression.

I would hold that when these employees do not work on a holiday, they are to be paid the holiday gratuity; and that when they do work on a holiday, they are to be paid the day rate plus 50 percent. That is how I read the statutes.

It seems inequitable that an employee who does not work on a holiday should receive a full day's pay, whereas an employee who is required to work shall be paid only time and a half, or
52 50 per cent more than is received by the one who does not work; but that is the way I read the statute. It would seem that the employee who is called back to work on a holiday should receive gratuity pay, plus regular pay, but the statute does

not so read, and only Congress has the power to correct what does seem to be an inequity.

JONES, *Chief Judge*, concurs in the foregoing dissenting opinion.

STIPULATION OF AMOUNT DUE—Filed April 17, 1951

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the amount of compensation due John Stuart Kelly is One Hundred Seventy-Two Dollars ($172.32) and Thirty-Two Cents. Such compensation is calculated upon the basis of one and one-half times the day rate for work of the type performed by Plaintiff Kelly upon the following holidays:

September 6, 1943	Labor Day
November 11, 1943	Armistice Day
November 25, 1943	Thanksgiving Day
February 22, 1944	Washington's Birthday
May 30, 1944	Memorial Day
July 4, 1944	Fourth of July
September 4, 1944	Labor Day
November 23, 1944	Thanksgiving Day
January 1, 1945	New Year's Day
February 22, 1945	Washington's Birthday

(S.) HENRY J. FOX,
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(S.) KENDALL M. BARNES,
Attorney for Defendant.
(S.) HOLMES BALDRIDGE,
Assistant Attorney General.

53-54 JUDGMENT OF THE COURT—Filed May 1, 1951

It appearing that on April 3, 1951, the Court filed special findings of fact with an opinion holding that plaintiff, John Stuart Kelly, was entitled to recover but suspended the entry of judgment to await the filing of a stipulation by the parties showing the exact amount to which plaintiff is entitled under the Court's decision; and it further appearing that on April 17, 1951, a stipulation was filed in which it is stated that the amount due is $172.32, now, therefore,

IT IS ORDERED this first day of May, 1951, that judgment be and the same is entered for plaintiff, John Stuart Kelly, in the sum of One Hundred Seventy-two Dollars and Thirty-two Cents ($172.32).

BY THE COURT

(S.) MARVIN JONES,
Chief Judge.

55 Clerk's Certificate to foregoing transcript omitted in printing.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 940320

57 Supreme Court of the United States

[Title omitted.]

Order allowing certiorari

Filed October 8, 1951

The petition herein for a writ of certiorari to the United States Court of Claims is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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U. S. GOVERNMENT PRINTING OFFICE: 1951

Office-Supreme Court, U. S.
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No. 269

In the Supreme Court of the United States

OCTOBER TERM, 1951

LIBRARY
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UNITED STATES, PETITIONER

v.

JOHN STUART KELLY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 209

UNITED STATES, PETITIONER

v.

JOHN STUART KELLY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled case on May 1, 1951.

OPINIONS BELOW

The opinion of the Court of Claims (R. 27-37) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on May 1, 1951 (R. 37). The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

In May 1943, a Presidential directive declared the wartime need for maximum output in all Government activities and directed that days normally observed by federal employees as holidays should be considered as regular work days for the duration of World War II. Federal per annum employees worked on these days throughout the war period without any additional compensation.

The question presented is whether the court below erred in construing the applicable wage agreement and federal pay statutes so as to allow federal per diem and per hour employees in the Government Printing Office two and one-half times their daily rate of pay for each holiday worked during the war period.

STATUTORY AND CONTRACT PROVISIONS INVOLVED

1. The 1924 wage agreement between the Public Printer and journeymen printers provides in pertinent part (R. 7):

> *Holiday Rate.* Employees required to work on a legal holiday or a special holiday declared by Executive Order shall be paid at the day rate plus 50 per cent for all the time actually employed in addition to their gratuity pay for the holiday as provided by law * * *.

2. When this agreement was negotiated, the Act of January 12, 1895 (28 Stat. 601, 607, Sec. 46, 44 U. S. C., 1934 ed., 44) made the following provision for holiday gratuity pay:

> The employees of the Government Printing Office shall be allowed the following legal holidays with pay, to wit: The first day of January, the twenty-second day of February, the fourth day of July, the twenty-fifth day of December, Inauguration Day, Memorial Day, Labor's Holiday, and such day as may be designated by the President of the United States as a day of public fast or thanksgiving.

3. On June 29, 1938, a Congressional resolution making the following provision for holiday gratuity pay took effect (52 Stat. 1246, 5 U.S.C. 86a):

> That hereafter whenever regular employees of the Federal Government whose compensation is fixed at a rate per day, per hour, or on a piece-work basis are relieved or prevented from working solely because of the occurrence of a holiday such as New Year's Day, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day, or any other day declared a holiday by Federal statute or Executive order, or any day on which the departments and establishments of the Government are closed by Executive order, they shall receive the same pay for such days as for other days on which an ordinary day's work is performed.

STATEMENT

This action was instituted by a petition filed in the Court of Claims by respondent Kelly and 613 other employees of the Government Printing Office to recover compensation for work performed

by them on certain holidays during World War II (R. 1-3, 27). For this work, they claimed compensation amounting to two and one-half times their regular daily rate of pay (R. 35). The parties stipulated that the claim of respondent Kelly should serve as a test case for the determination of the other 613 claims (R. 27).

The genesis of these claims, though not disclosed in the transcript, is readily apparent from the official records concerning the wartime policy and practice of requiring all federal employees to work on holidays regularly observed during peacetime. On May 12, 1943, a Presidential Directive addressed to the heads of the executive departments and agencies declared that:

> The necessity for maintaining maximum output in Government activities throughout the war period requires that days normally observed by the departments and agencies as holidays should with the exception of Christmas, be considered as regular work days for the duration of the war.[1]

On December 17, 1943, this Directive was reaffirmed, the President's Administrative Assistant noting:

> This policy is consistent with the attitude of the Government toward maintenance of

[1] See Digest of Provisions of Law Fixing Pay for Employees in the Executive Branch of the Federal Government, compiled by the U. S. Civil Service Commission, March 1945, p. 94.

full production in war industry on Holidays other than Christmas.

The President has reaffirmed his desire previously expressed on this matter.

There is full realization of the long hours which Federal employees are continuously working in the interest of the war effort and of the fact that holiday work is performed by Federal employees without additional compensation. The policy with respect to work on holidays will be reconsidered at the earliest possible moment that progress in the war will permit.

Christmas Day and Christmas Eve have traditionally been important family days in the life of this Nation. The President has indicated that the heads of departments and agencies may, in their discretion, permit offices or establishments to be closed or any employees whose services can be spared to leave their work not earlier than two hours in advance of the usual closing time on Christmas Eve, December 24.

With respect to forthcoming holidays other than Christmas you are advised that the President expects them to be observed as regular full working days.[2]

Respondent Kelly was regularly employed by the Government Printing Office in Washington as a journeyman printer from September, 1943 through February, 1945 (R. 1). Throughout this

[2] This quotation is from the Special Findings of Fact of the Court of Claims in *Di Benedetto* v. *United States*, 108 C. Cls. 18, 21-22, certiorari denied, 332 U. S. 763.

wartime period, when the following ten holidays were treated as regular workdays for the Government service generally, Kelly was also required to work (R. 7):

September 6, 1943	Labor Day
November 11, 1943	Armistice Day
November 25, 1943	Thanksgiving Day
February 22, 1944	Washington's Birthday
May 30, 1944	Memorial Day
July 4, 1944	Fourth of July
September 4, 1944	Labor Day
November 23, 1944	Thanksgiving Day
January 1, 1945	New Year's Day
February 22, 1945	Washington's Birthday

For work on these days, Kelly, who was on the night shift, received only his regular rate of pay, including the night differential (R. 7).[3]

During this period, Kelly's compensation was fixed by a wage agreement negotiated by the Public Printer and a committee of employees representing the journeymen printers of the Government Printing Office (R. 6).[4] The agreement at all

[3] On holidays falling between September 6, 1943, and July 4, 1944, both dates inclusive, the day rate for work of the type performed by Kelly was $1.38 an hour, and the night rate was $1.584. Kelly was paid the latter rate for all hours of holiday work during this period. On the listed holidays subsequent to July 4, 1944, the day rate for work of the type performed by Kelly was $1.52 an hour, and the night rate was $1.75 an hour. On the holidays during this period Kelly was likewise paid the night rate. (R. 7-8).

[4] The agreement originally became effective on October 27, 1924 (R. 6). It was entered into under the Act of June 7, 1924 (43 Stat. 658, 44 U. S. C. 40) and was approved by the Joint Committee on Printing under that Act (R. 6).

times here material contained the above-quoted provision authorizing payment for holiday work at the day rate plus 50 percent "[plus] gratuity pay for the holiday as provided by law." (*Supra*, p. 2; R. 7).

On April 23, 1948, Kelly submitted a claim to the Acting Public Printer requesting that he be allowed additional compensation equal to one and one-half times his day rate for work performed by him on several of the holidays listed above (R. 3). This claim was forwarded to and disallowed by the Comptroller General on March 28, 1949 (R. 4-5). Kelly then brought suit in the court below, seeking recovery of pay equal to one and one-half times the day rate, in addition to the pay already received by him at the night rate, for all hours worked on the listed holidays.[5]

The Court of Claims held that the 1938 Resolution (*supra*, p. 3), which authorizes payment of holiday gratuity pay only for those holidays on which an employee is prevented from working, "did not deny to the plaintiff Kelly his right to holiday pay in addition to the pay earned by him when he worked on holidays" (R. 31). Since he had already received his full regular pay,[6] the court accordingly entered judgment for $172.32, an amount equal to one and one-half times the day

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[5] This suit was actually brought by Kelly and 613 other plaintiffs employed at the Government Printing Office. See *supra*, p. 3.

[6] See note 3, *supra*, p. 6.

rate for the ten holidays on which he worked (R. 37). Judge Whitaker, in a dissenting opinion in which Chief Judge Jones concurred, urged that Kelly should not be entitled to two and one-half times his regular pay for work done on the holidays but only to the day rate plus 50 percent. Judge Whitaker reasoned that the wage agreement (*supra*, p. 2) allowed employees who worked on holidays to be paid the day rate plus 50 percent in addition to any holiday gratuity pay provided by law; that subsequent to the 1938 Resolution the law provided for holiday gratuity pay only when an employee is "relieved or prevented" from working on a holiday; and that there was no provision in the 1938 Resolution which authorized gratuity pay for a holiday on which an employee did work (R. 36).

REASONS FOR GRANTING THE WRIT

The Court of Claims has held that Government Printing Office employees are entitled to two and one-half times their regular rate of pay[7] for holiday work performed by them during World War II when, pursuant to Presidential orders issued to achieve maximum wartime output, holidays generally were not observed in the federal service and per annum employees received no additional compensation for working. The court below reached

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[7] Under the decision of the court below, an employee is entitled to 2½ times his regular rate of pay if his regular rate is the day rate. If, like respondent Kelly, the regular rate is the night rate, he is entitled to the regular rate plus 1½ times the day rate, totalling an amount in excess of 2½ times the day rate.

that conclusion by construing the 1938 Resolution so as to allow gratuity pay [8] to per diem employees who did work on such holidays, even though the gratuity benefits of the Resolution are expressly limited to those employees who are *prevented* from working on holidays. We submit that that holding not only ignores the express language of the Resolution but also disregards its plain purpose and consistent administrative interpretation. Moreover, in view of the huge number of present and potential claims, the decision below, if allowed to stand, will impose a heavy financial, litigation, and administrative burden upon the Government. In view of the manifest importance of this decision and the substantial doubts as to its correctness, we submit that this case is appropriate for review here.

1. *The 1938 Resolution prohibits gratuity pay for holidays on which an employee works.* (a) *The express terms of the Resolution.* The Resolution states clearly the condition under which holiday gratuity pay is authorized. It provides for such payment only where the employee is "relieved or prevented from working solely because of the occurrence of a holiday." *Supra*, p. 3. If the holiday prevents him from working, he gets gratuity pay under the Resolution; if it does not prevent him from working, he is not entitled to holiday

[8] Gratuity pay allowed for a holiday by the 1938 Resolution is equal to the employee's ordinary daily pay. See *supra*, p. 3.

pay. If he works on a holiday, it is obvious that he has not been prevented from working because of the holiday and is therefore not entitled to any gratuity pay under the 1938 Resolution.

The Resolution is clear and unambiguous and "must be taken to mean just what it says" (R. 35). Since Kelly was not prevented or relieved from working on the holidays involved here, but, on the contrary, did work on those days, he is not entitled to the gratuity pay provided by the 1938 Resolution. It is true that under the wage agreement, he was entitled to the day rate plus 50 percent for holiday work in addition to any gratuity pay provided by law. But, after the 1938 Resolution became effective, there was no gratuity pay provided by law for employees who actually worked on holidays. Kelly was at the most, therefore, entitled to the day rate plus 50 percent for any holiday on which he worked.[9]

(b) *The purpose of the Resolution.* The purpose and background of the 1938 Resolution confirm the need for limiting gratuity pay to those holidays on which an employee does not work. A predominant characteristic of pay legislation for Government workers has been to avoid discrimina-

[9] In the court below the Government contended that Section 23 of the Act of March 28, 1934 (48 Stat. 522, 5 U.S.C. 673c) rendered inoperative the provision of the 1924 wage agreement requiring payment of more than straight time rates for work on a holiday which fell within the regular 40 hour workweek. *Supra*, p. 2. The majority and dissenting opinions in the decision below rejected that contention (R. 34, 36) and it is not raised here.

tion between groups of Federal employees performing similar services, frequently under identical conditions. As early as 1880, the preferential treatment then accorded per annum employees with respect to holiday pay was recognized by Congress. Per annum employees, whose salaries are traditionally regarded as payment for every calendar day in the year (whether a workday or nonworkday), have always received their regular pay each period, regardless of any holidays on which they are excused from working. Per diem and hourly employees, on the other hand, were not paid for holidays on which they did not work.

An 1880 Resolution eliminated this inequality and prevented holidays from reducing the amount of the regular pay checks of Government Printing Office per diem employees. The Resolution allowed these employees specified "legal holidays with pay" and provided "that the said employees shall be paid for these holidays only when the employees of the other government departments shall be so paid." Joint Resolution of April 16, 1880 (21 Stat. 304). Five years later, all per diem employees of the Government were also allowed legal holidays with the "same pay as on other days." Joint Resolution of January 6, 1885 (23 Stat. 516, 5 U.S.C. 86). And, in 1895, a Resolution applicable only to Government Printing Office employees allowed them eight specified "legal holidays with pay." 28 Stat. 607, Sec. 46, 44 U.S.C. 44.

The purpose of these statutes, as has been noted, was to place per diem employees on a par with per annum employees. But the broad language of the resolutions went beyond that purpose and was interpreted so as to accord per diem employees preferential treatment over per annum employees in two major respects: First, per diem employees were allowed a day's gratuity pay even when a holiday on which they did not work fell on Saturday or Sunday (a nonworkday) so that they received an extra day's pay in addition to the full week's pay otherwise earned. Secondly, if they worked on a holiday, they received a day's gratuity pay in addition to their regular rate of pay for that day. 13 Comp. Gen. 295, 297; 18 Comp. Gen. 186, 187. Per annum employees, holding comparable positions, received neither of these benefits. A day's pay was not added to their wages where a holiday occurred on a nonworkday. Nor did they receive any extra gratuity pay for a holiday on which they worked.

This situation was brought before Congress in its consideration of H. J. Res. 551, 75th Congress, 3rd sess., which became the 1938 Resolution. It is true that the sole original purpose of H. J. Res. 551 was to make per diem employees eligible for gratuity pay for certain additional holidays on which they did not work and on which regular employees were excused from work by Executive Order. 83

Cong. Rec. 9466.[10] But a letter from the Acting Comptroller General to the Secretary of the Navy, reprinted in the Report of the House Committee on the Civil Service, which recommended passage of H. J. Res. 551, shows that Congressional attention was also drawn to the two preferential benefits accorded per diem employees in interpreting the earlier Resolutions. The letter pointed out that

> * * * even when any of such holidays falls on a nonworkday (such as a Saturday), such employees [*i.e.* per diem employees] receive pay for the holiday when no work is performed thereon, in addition to the full week's pay otherwise earned,

and that per diem employees received

> double compensation for the [holi]day if work is performed thereon. [H. Rep. No. 2683, 75th Cong., 3d sess., p. 5.]

Since the language of the Resolution as introduced was not broad enough to eliminate this preferential treatment, a substitute measure was adopted by the House Civil Service Committee. This substitute measure was enacted as the 1938

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[10] The Comptroller General had ruled that per diem employees were entitled to holiday pay only for the holidays specified in the existing statutes (*e.g.*, the 1895 Resolution, *supra*, pp. 2-3, 11), and could not receive such pay for additional holidays granted by the President, *e.g.*, December 24, 1937. See R. 28-29. H. J. Res. 551 was thereafter introduced and provided, in its original form, only for the payment of compensation to per diem employees who did not work on December 24, 1937. H. Rep. No. 2683, 75th Cong., 3d sess., p. 1.

Resolution and wiped out both preferential benefits by prohibiting gratuity pay for a holiday except where the per diem employee was "relieved or prevented from working solely because of the occurrence" of the holiday. *Supra,* p. 3. Thus, if the holiday on which the per diem employee did not work fell on a Sunday (a nonworkday), he was not to receive any gratuity pay for that holiday because it was not the occurrence of the holiday which made Sunday a nonworkday for him. Similarly, if he worked on the holiday, he was entitled to his regular rate of pay but not to any gratuity pay in addition because the holiday did not prevent him from working. To make certain that preferential benefits would no longer be available to per diem employees, the 1938 Resolution expressly repealed the earlier inconsistent Resolutions under which these benefits had been allowed by administrative interpretation. 52 Stat. 1247. By eliminating these preferential benefits, the 1938 Resolution, as noted in the dissenting opinion below, "carried out the intent of the original resolution and made it plain that per diem employees were entitled to gratuity pay only when they did not work on a holiday" (R. 36).

(c) *Consistent administrative construction.* The Comptroller General has consistently ruled that under the 1938 Resolution gratuity pay may not be permitted for those holidays on which an employee actually worked. These rulings, relying

on the plain terms of the Resolution, show that, if any employee worked on a holiday, he obviously was not prevented from working because of the holiday and was, therefore, ineligible for gratuity pay. The earliest of these rulings were handed down within a few weeks after the 1938 Resolution took effect. 18 Comp. Gen. 10; 18 Comp. Gen. 186; 18 Comp. Gen. 191.

Since that time, the General Accounting Office has consistently adhered to this natural interpretation of the 1938 Resolution. Such a consistent administrative construction is entitled to great weight and "is not to be overturned unless clearly wrong, or unless a different construction is plainly required." *United States* v. *Citizens Loan and Trust Company*, 316 U.S. 209, 214; *United States* v. *Jackson*, 280 U.S. 183, 193. Certainly, in view of the express language and purpose of the 1938 Resolution, there is at the very least a reasonable basis for the consistent construction accorded the Resolution by the Comptroller General. Since that construction was not clearly wrong, the Court of Claims erred in setting it aside.

2. *The wartime policy of nonobservance of holidays supports denial of gratuity pay.* In normal times there is ample justification for paying an employee bonus or premium pay when he works on a holiday. Holiday work is more onerous and burdensome than work on a regular weekday. A holiday is a day for religious, patriotic, or recreational pur-

suits. Assignment to holiday work involves on the part of the employee a departure from the normal way of living. These considerations justify payment of premium pay to those federal employees who are required to work when other federal employees are excused from work and allowed to enjoy an uninterrupted holiday without any loss of pay.

The court below, however, completely overlooked the fact that during wartime none of these considerations is pertinent. Perhaps one of the least inconveniences in World War II was that suffered by civilian employees who had to give up their holidays so as to attain the maximum output needed for waging a successful war. The 1943 Presidential Directives, declaring this need, required all civilian government employees to work on all holidays throughout the war with the exception of Christmas. *Supra,* pp. 4-5. The normal peacetime holidays were thus converted into regular workdays and employees generally were required to work on those days "without additional compensation" (Presidential Directive, December 17, 1943, *supra,* p. 5).

This policy of allowing gratuity pay for holiday work in peacetime (where such work is unusual) and of prohibiting it in wartime (when holidays are regular workdays) is reflected in the Federal Employees Pay Act of 1945. That Act, which became law after VE Day, but before VJ Day,

provided that its provision for premium pay for holiday work should not take effect until "cessation of hostilities in the present war." 59 Stat. 298, Sec. 302, 5 U.S.C. 922. Postponement of the effective date of the premium pay provision was necessary because of express Congressional recognition of the policy that during World War II, "all holidays, except Christmas, are regular workdays." H. Rep. 726, 79th Cong., 1st sess., p. 13.[11] Since the holidays involved in the instant litigation were regular wartime workdays, it is apparent that the decision below allowing premium pay conflicts with well-established policy allowing such pay only for peacetime holidays in fact. Cf. *Di Benedetto* v. *United States*, 108 C. Cls. 18, certiorari denied, 332 U.S. 763. In doing so, the court below has placed per diem employees in a superior status expressly denied to per annum employees by consistent legislative and administrative policy.

3. *The decision below is of substantial importance.* If the decision below is allowed to stand, it will impose a heavy financial, administrative, and litigation burden upon the United States. The instant case itself involves 614 separate claims for extra pay for holiday work. The General Accounting Office has also advised that in the two and one-half month period follow-

[11] This Report accompanied H. R. 3393, which became the Federal Employees' Pay Act of 1945.

ing the date of the decision of the court below, 1807 additional claims were filed for extra pay for holiday work. Moreover, in view of the fact that holidays in wartime were regular workdays for all employees, the implications of the decision below may extend not only to all Government Printing Office employees, but to all employees of the Government whose compensation is fixed at a rate per day or per hour or on a piecework basis.[12]

CONCLUSION

For the above reasons, it is respectfully submitted that this petition should be granted.

PHILIP B. PERLMAN,
Solicitor General.

JULY, 1951.

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[12] Information obtained from the General Accounting Office reveals that during 1943 alone there were 695,000 "ungraded" employees in the War Department, the majority of whom were paid on a per diem, per hour or piece-work basis. That Office has also advised that the peak employment figure for the same class of employees in the Navy Department reached 500,000 in 1945. Recovery by these employees on holiday pay claims in the Court of Claims would generally be barred by the six-year statute of limitations applicable in that court. But it is significant that the claims may be cognizable in the General Accounting Office because of the ten-year limitation period there applicable. See Act of October 9, 1940, 54 Stat. 1061.

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SUPREME COURT, U.S.
NOV 19 1951

No. 209

In the Supreme Court of the United States

OCTOBER TERM, 1951

UNITED STATES, PETITIONER

v.

JOHN STUART KELLY ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Claims (R. 27–37) is reported at 96 F. Supp. 611.

JURISDICTION

The judgment of the Court of Claims was entered on May 1, 1951 (R. 37). The petition for a writ of certiorari was filed on July 26, 1951, and was granted October 8, 1951. The jurisdiction of this Court rests on 28 U. S. C. 1255(1).

QUESTION PRESENTED

In May 1943, a Presidential directive declared the wartime need for maximum output in all

Government activities and directed that days normally observed by federal employees as holidays should be considered as regular work days for the duration of World War II. Federal per annum employees worked on these days throughout the war period without any additional compensation.

Respondent, an employee of the Government Printing Office, was required to work on ten holidays during World War II. His compensation was fixed on an hourly basis under a wage agreement providing that holiday work should be compensated at the regular rate increased by 50% plus "gratuity pay for the holiday as provided by law." Under the applicable Joint Resolution of June 29, 1938, respondent was entitled to gratuity pay for those holidays only on which he was "relieved or prevented from working solely because of the occurrence" of such holiday.

The question presented is whether the court below erred in construing the applicable wage agreement and federal pay statutes so as to allow federal per diem and per hour employees in the Government Printing Office two and one-half times their daily rate of pay for each holiday worked during the war period.

STATUTES AND WAGE AGREEMENT INVOLVED

1. The Joint Resolution of June 29, 1938 (52 Stat. 1246, 5 U. S. C. (1946 ed.) 86a) provides:

> * * * That hereafter whenever regular employees of the Federal Government

whose compensation is fixed at a rate per day, per hour, or on a piece-work basis are relieved or prevented from working solely because of the occurrence of a holiday such as New Year's Day, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day, or any other day declared a holiday by Federal statute or Executive order, or any day on which the departments and establishments of the Government are closed by Executive order, they shall receive the same pay for such days as for other days on which an ordinary day's work is performed.

"SEC. 2. The joint resolution of January 6, 1885 (U. S. C., title 5, sec. 86), and all other laws inconsistent or in conflict with the provisions of this Act are hereby repealed to the extent of such inconsistency or conflict.

2. The 1924 wage agreement between the Public Printer and journeymen printers provides in pertinent part (R. 7):

Holiday Rate.—Employees required to work on a legal holiday or a special holiday declared by Executive Order shall be paid at the day rate plus 50 per cent for all the time actually employed in addition to their gratuity pay for the holidays as provided by law * * *.

3. The pertinent portions of the Acts of January 13, 1883 (22 Stat. 402); January 12, 1895

sec. 46 (28 Stat. 607, 44 U. S. C. (1934 ed.) 44); and June 7, 1924 (43 Stat. 658, 44 U. S. C. (1946 ed.) 40); and of the Joint Resolutions of April 16, 1880 (21 Stat. 304), and January 6, 1885 (23 Stat. 516, as amended, 5 U. S. C. (1934 ed.) 86) are set forth in Appendix A, *infra*, pp. 41–44.

STATEMENT

This action was instituted by a petition filed in the Court of Claims by respondent Kelly and 613 other employees of the Government Printing Office, seeking compensation at the rate of two and one-half times their regular rate for work performed by them on ten holidays during World War II (R. 1–3, 24, 27). The parties stipulated that the claim of respondent Kelly should serve as a test case for the determination of the other 613 claims (R. 5–6).

The pertinent facts are these:

1. A Presidential directive, dated May 12, 1943, provided that days normally observed by the departments and agencies as holidays, with the exception of Christmas, should be considered as regular work days for the duration of the war.[1] This directive was reaffirmed on December 17, 1943, by Mr. W. H. McReynolds, Administrative Assistant to the President, in the following state-

[1] See Digest of Provisions of Law Fixing Pay for Employees in the Executive Branch of the Federal Government, compiled by the U. S. Civil Service Commission, March 1945, p. 94, and *infra*, pp. 5–6.

ment addressed to the heads of the Federal Departments and Agencies:

On May 13, 1943, by direction of the President, I issued the following statement concerning the observation of holidays:

"The necessity for maintaining maximum output in Government activities throughout the war period requires that days normally observed by the departments and agencies as holidays should, with the exception of Christmas, be considered as regular work days for the duration of the war."

This policy is consistent with the attitude of the Government toward maintenance of full production in war industry on Holidays other than Christmas.

The President has reaffirmed his desire previously expressed on this matter.

There is full realization of the long hours which Federal employees are continuously working in the interest of the war effort and of the fact that *holiday work is performed by Federal employees without additional compensation.* The policy with respect to work on holidays will be reconsidered at the earliest possible moment that progress in the war will permit.

Christmas Day and Christmas Eve have traditionally been important family days in the life of this Nation. The President has indicated that the heads of departments and agencies may, in their discretion, per-

> mit offices or establishments to be closed or any employees whose services can be spared to leave their work not earlier than two hours in advance of the usual closing time on Christmas Eve, December 24.
>
> With respect to forthcoming holidays other than Christmas you are advised that the President expects them to be observed as regular working days.' [Italics supplied.]

Per annum employees accordingly worked on these holidays without compensation and this rule was applied also to those per annum employees entitled to extra compensation for holiday work. *Di Benedetto* v. *United States*, 108 C. Cls. 18, certiorari denied, 332 U. S. 763.[2]

2. Respondent Kelly was a journeyman printer employed in the Government Printing Office. His salary was fixed on an hourly basis by a wage agreement negotiated between the Public Printer and an employee's committee as provided by the Act of June 7, 1924 (Appendix, *infra*, pp. 42–44). (R. 22–23.)[4] Kelly, who was on the night shift,

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[2] This quotation is from the Special Findings of Fact of the Court of Claims in *Di Benedetto* v. *United States*, 108 C. Cls. 18, 21–22, certiorari denied, 332 U. S. 763.

[3] Executive Order No. 9240 of September 9, 1942, 7 F. R. 7159, had limited the holiday pay of persons employed in war work to one and one-half times the regular wage.

[4] This wage agreement originally had become effective October 27, 1924. It was amended from time to time thereafter (R. 22). An amendment which took effect on August 13, 1944 (cf. R. 4) changed the wage rates (cf. Finding No. 6, R. 24) but did not affect the holiday pay provisions.

worked on ten holidays during wartime pursuant to the above-mentioned Presidential directives and received for this work the regular hourly rate plus night differential (Finding No. 6, R. 24). Kelly, however, asserted that, in addition to this, he was entitled to one and one-half times the day rate, by virtue of the holiday rate clause of the wage agreement which reads as follows:

> *Holiday Rate.*—Employees required to work on a legal holiday or a special holiday declared by Executive Order shall be paid at the day rate plus 50 per cent for all the time actually employed in addition to their gratuity pay for the holiday as provided by law. * * *[3]

Respondent's claim for additional compensation was forwarded to the Comptroller General's Office where it was disallowed (R. 24; 4–5) on the grounds that the Joint Resolution of June 29, 1938 (52 Stat. 1246, *supra*, pp. 2–3) had abolished gratuity pay for work performed on holidays, and that the payment of 50% extra compensation was prohibited under the Act of March 28, 1934 (48 Stat. 522). Kelly, taking the position that the two enactments had no bearing on his claim, brought suit in the Court of Claims seeking recovery of pay equal to one and a half

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[3] Under this paragraph, the compensation for holiday work consists of three elements:

a. The day, for which he has been paid (R. 24);

b. An additional compensation of 50% (*infra*, p. 8); and

c. Gratuity pay for the holiday "as provided by law."

times the day rate, in addition to the night rate already collected by him. The case was tried on the basis of a detailed stipulation of facts (R. 5–22, cf. R. 22–26).

3. The Court of Claims held unanimously that the Act of March 28, 1934, *supra*, did not defeat respondent's right to the 50% extra compensation. Petitioner has not questioned this branch of the decision (Appendix B, *infra*, pp. 45–46; Petition for a Writ of Certiorari, p. 10, fn. 9). With respect to the respondent's claim for "gratuity pay as provided by law," the court below held—Jones, C. J. and Whitaker, J. dissenting—that the award of premium pay for holiday work was based on an administrative construction of the pertinent statutes going back to 1895 and that neither the language of the 1938 statute nor its legislative history contained any express indication that Congress intended to abrogate these rights enjoyed by the employees of the Government Printing Office for more than forty years. It felt that the sole purposes of the 1938 Resolution were the grant of holiday pay to per diem workers on holidays proclaimed by Executive Order and the abolition of the rule that per diem employees were entitled to holiday pay even if the holiday fell on a nonworking day. The court refused to attribute to Congress an intent to award to an employee who worked on a holiday the same pay as to one who did not.

The dissenting judges urged that the language

of the 1938 Resolution was unambiguous; that there should be no recourse to considerations extraneous to that language; and that its language was consistent with the express purpose of the Resolution to put per diem workers on a parity with per annum workers. Moreover, they pointed out that employees required to work on a holiday received 50% more than those who did not work, and while they thought that this differential was inadequate,[6] the remedy for this supposed injustice lay with Congress.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In holding that the Resolution of June 29, 1938, 52 Stat. 1246, required the payment of gratuity pay to per diem employees on holidays on which they worked.

2. In holding that respondent was entitled to gratuity pay for a holiday on which he worked.

3. In entering judgment for respondent for gratuity pay.

SUMMARY OF ARGUMENT

Respondent seeks compensation for work performed on ten holidays during World War II. Under the wage agreement covering his trade, the holiday compensation to which he was entitled

[6] The same differential applied to war industries throughout World War II. *Termination Report of the War Labor Board*, Vol. I, p. 361. On May 28, 1946, the Public Printer increased the differential to 100% (R. 26, fn. 4).

was composed of three items: (a) the day rate, (b) 50% extra pay, and (c) gratuity pay "as provided by law." There is no dispute here that respondent was entitled to (a) and (b). The narrow issue involved in this case is whether the law provides for the payment of gratuity pay. The pertinent statute, the Joint Resolution of June 29, 1938 (52 Stat. 1246, 5 U. S. C. (1946 ed.) 86a, *supra*, pp. 2–3), grants holiday pay—colloquially called gratuity pay—only to those per diem employees who are prevented from working by the occurrence of a holiday. Respondent seeks to overcome the express language of the 1938 Resolution, limiting holiday pay to those who are prevented from working solely because of the occurrence of a holiday, by arguing that an administrative practice going back to 1895 had awarded double pay for holiday work and that neither the language of the 1938 Resolution nor its legislative history reveals an intent to repeal this administrative practice.

I

Pursuant to the 1938 Resolution a per diem worker is entitled to holiday pay as a statutory right only when he is "relieved or prevented from working solely because of the occurrence of a holiday." Hence, under the clear and unambiguous language of the statute respondent is not entitled to gratuity pay, as a matter of law, for work performed on a holiday. The earlier

doubtful administrative interpretation of differently worded statutes granting paid holidays—which held, by way of implication, that a per diem employee was as a matter of right entitled to double pay for holiday work—cannot be carried over to the 1938 Resolution which supersedes the prior acts and is worded in a way which does not admit of such construction. Nor is it significant that Congress failed to repeal this administrative practice expressly. When Congress writes a new statute it is to be interpreted according to its own terms; and they cannot be overcome by the failure of the Act or of its legislative history to spell out in so many words an intent to put an end to all the incidents and interpretative ramifications of the superseded legislation.

Holidays evoke two questions with respect to the pay of per diem employees. The first is that, since they are normally paid only for work actually done, they suffer a loss of income if a holiday prevents them from working as they otherwise would. On the other hand, if they work on a holiday the question arises whether they are entitled to extra compensation over and above their regular pay. This latter question is generally dealt with in the collective bargaining agreements under which per diem workers are employed. The Joint Resolution of 1938 limited the mandatory award of holiday pay to the situation where a per diem employee does not work,

and remitted the issue of extra compensation for holiday work to wage agreements and the administrative determination of the prevailing wage.

This reading of the 1938 Resolution is supported by contemporaneous interpretations given by the Comptroller General and by the Committee of the House of Representatives on the Revision of the Laws, both to the effect that it does not require the award of double pay for holiday work.

II

An examination of the legislative history of the 1938 Resolution reveals an intent of Congress to equalize the position of per diem and per annum workers with respect to holiday pay. Per diem workers were, henceforth, entitled to pay on every holiday; on the other hand, the ancient practices of mandatory double pay for holiday work (in addition to contractual extra pay) and of holiday pay for holidays falling on nonworking days were abolished.

The court below argued that the legislative history of the 1938 Resolution indicated merely an intent to award holiday pay for holidays established by administrative order and not specified in the statutes, and to abolish holiday pay for holidays falling on nonworking days; and the court felt that it could not ascribe to Congress the aim of requiring holiday work without additional mandatory compensation and of abro-

gating without specific words the old administrative practice of awarding double pay for holiday work. Even if one disregards the plain meaning of the 1938 Resolution, these arguments are unpersuasive. As pointed out above, double pay for overtime was expressly referred to in the legislative history of the 1938 Resolution, and there is good reason to believe that Congress desired to abolish the supposed mandatory requirement. The new statute does not prohibit the stipulation, by contract or otherwise, of extra compensation for holiday work, as witnessed by this very case in which 50% additional pay has been awarded pursuant to the wage agreement.

Moreover, the meaning of the former administrative practice of double pay for holiday work is doubtful. If it merely meant that under the statutes governing the employment of per diem employees the award of double pay for overtime was *authorized,* we take no issue with it; and it is not in the least affected by the 1938 Resolution. If it was supposed to mean that a statute—such as the legislation superseded by the 1938 Resolution—awarding paid holidays *requires,* by necessary implication, the award of double pay for holiday work, it is of very doubtful statutory authority and should have very little weight in applying the plain language of the 1938 Resolution.

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III

The wartime policy of nonobservance of holidays supports denial of gratuity pay to per diem employees. Per annum employees worked, without gratuity compensation, on all of the holidays for which respondent seeks to recover extra pay. In granting recovery, the Court of Claims has thus placed per diem employees in a superior status denied to per annum employees by consistent legislative and administrative policy. Neither the terms of the 1938 Resolution, nor its history, require such discrimination.

ARGUMENT

Respondent's claim is based on a wage agreement arrived at by a process of collective bargaining (Act of June 7, 1924, Sec. 1, 43 Stat. 658, 44 U. S. C. 40; *infra*, pp. 42–44; cf. *Determination of Wage Rates for Mechanical and Laboring Positions in the Federal Service*, (1944), 59 Monthly Labor Review 1063, 1069). The contract provides that employees required to work on legal holidays shall be paid the day rate plus 50 percent, in addition to their gratuity pay for the holidays *as provided by law*. Petitioner does not question the unanimous holding of the court below that respondent is entitled to the day rate plus 50 percent. The sole issue presented is whether respondent is entitled to an additional 100 percent gratuity pay for a holiday on which

he worked, together with all other wartime Government workers. We submit that he is not.

I

THE APPLICABLE PAY STATUTE—THE JOINT RESOLUTION OF JUNE 29, 1938—DOES NOT REQUIRE THE AWARD OF GRATUITY PAY TO GOVERNMENT PRINTING OFFICE EMPLOYEES WHO WORKED ON HOLIDAYS DURING THE WAR

Since the wage agreement provides that "gratuity pay" for holidays is to be paid "as provided by law" (*supra*, p. 3), the inquiry must be whether, and to what extent, any statute confers a right to such gratuity pay. The present statute governing holiday pay, colloquially called "gratuity pay," for Government employees whose compensation is fixed on a day, hourly or piece-work basis (referred to in this brief as per diem employees in contrast to the per annum employees) is the Joint Resolution of June 29, 1938 (52 Stat. 1246, 5 U. S. C. (1946 ed.) 86a), providing:

> That hereafter whenever regular employees of the Federal Government whose compensation is fixed at a rate per day, per hour, or on a piece-work basis are *relieved or prevented from working solely because of the occurrence of a holiday* such as New Year's Day, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day, or any other day declared a holiday by Federal statute or Executive order, or any

day on which the departments and establishments of the Government are closed by Executive order, they shall receive the same pay for such days as for other days on which an ordinary day's work is performed. [Italics supplied.]

Our argument is that this 1938 Joint Resolution provides for the payment of gratuity holiday pay only to those per diem employees who are *prevented* from working because of the occurrence of a holiday, and it does not grant statutory extra compensation to those employees required to work on a holiday. Accordingly, where a per diem employee works on a holiday, the statute confers no right to gratuity pay, and none is therefore "provided by law." Since the passage of the Joint Resolution, this has been the consistent administrative interpretation.

A. THE EXPRESS TERMS OF THE 1938 RESOLUTION REQUIRE THE PAYMENT OF GRATUITY HOLIDAY PAY ONLY TO THOSE PREVENTED FROM WORKING AS THE RESULT OF A HOLIDAY

1. The Resolution expressly states the only condition under which holiday pay is statutorily required. It provides for such payment only where the employee is "relieved or prevented from working solely because of the occurrence of a holiday." If the holiday prevents him from working, he receives gratuity pay under the Resolution; if it does not prevent him from working, he is not entitled to holiday pay as a matter of statutory right. If he works on a

holiday, it is obvious that he has not been prevented from working because of the holiday and is therefore not entitled to any gratuity pay under the Resolution. As the dissenting judges said below (R. 35), the Resolution "is clear and unambiguous and must be taken to mean just what it says."[7] Since Kelly was not prevented or relieved from working on the holidays involved here, but, on the contrary, did work on those days, he is not entitled to any gratuity pay as a matter of law.

2. Insofar as an administrative gloss on earlier statutes had held that a per diem employee required to work on a holiday was entitled to double pay, that gloss fell with the legislation

[7] It is a basic rule of statutory interpretation that where the literal reading of a statute leads to no ambiguity nor to any futile or absurd results nor to any outcome plainly at variance with the policy of the legislation as a whole, the plain meaning of the words should normally be followed. *United States* v. *American Trucking Associations, Inc.*, 310 U. S. 534, 543. "Where the intent is plain, nothing is left to construction," *United States* v. *Fisher*, 2 Cranch 358, 386. It has been constantly said that the various rules of statutory construction, being confined to the resolution of ambiguity, have little place where the meaning of a statute is plain and clear. *Packard Co.* v. *Labor Board*, 330 U. S. 485, 492; *Osaka Shosen Line* v. *United States*, 300 U. S. 98; *Miguel* v. *McCarl*, 291 U. S. 442, 453; *United States* v. *Missouri Pac. R. Co.*, 278 U. S. 269, 277; *Russell Co.* v. *United States*, 261 U. S. 514, 519; *Greenport Co.* v. *United States*, 260 U. S. 512, 516; *Thompson* v. *United States*, 246 U. S. 547, 551; *Caminetti* v. *United States*, 242 U. S. 470; *United States* v. *Barnes*, 222 U. S. 513; *Hamilton* v. *Rathbone*, 175 U. S. 414, 421.

to which it was appended.[8] For this administrative holding had been derived by implication from the Act of January 12, 1895 (*infra*, p. 42), which "allowed" Government Printing Office employees eight specified legal holidays "with pay," and it is quite clear that the 1895 Act was necessarily superseded by the 1938 Resolution which made its own provision for holiday pay and contained its own list of holidays. Indeed, Section 2 of the 1938 Resolution expressly repealed all inconsistent or conflicting laws (*supra*, p. 3), and, of course, administrative interpretations of such laws would also necessarily fall.

Respondent and the Court of Claims insist, however, that there is no showing that Congress intended specifically to repeal the administrative practice with respect to premium pay which had been based on the 1895 statute. Even if this were so (but see *infra*, pp. 25 *ff*), it surely could not be said that the legislative history of a superseding statute must explicitly touch upon all phases of the incidence and interpretation of the act which is being displaced. Here, the body of the earlier statute was necessarily superseded, and the precise terms of the new act preclude a construction, akin to that placed on the somewhat ambiguous terms of the old act, making double pay for holi-

[8] We urge below that this gloss was erroneous and that the earlier statutes which simply "allowed" certain holidays "with pay" did not *require* the payment of premium pay for holiday work. *Infra*, pp. 33–37.

day work mandatory. In these circumstances, there is surely no warrant for rewriting the plain wording of the 1938 statute by placing upon it a gloss derived from a doubtful administrative interpretation of the earlier act and the supposed failure of the legislative history of the 1938 Resolution to indicate expressly that Congress intended to change this practice.

3. The incidence of holidays creates two problems with respect to the pay of per diem employees. The first is whether they should be compensated for the loss of income occasioned by the closing of the establishment on the holiday. The other issue is whether an employee required to work on a holiday should be granted additional compensation. In our view, the 1938 Resolution established mandatory statutory requirements only for the first situation, *i. e.*, pay for holidays not worked. The other problem of additional compensation for holiday work it remitted to the processes of collective bargaining and the discretion of the employing agencies. Whatever *mandatory* statutory requirements may previously have existed in this second sphere—and we believe there were none (*infra*, pp. 35–37)—were abolished, and the entire matter of wages for holidays worked was left free of statutory compulsion.

It was quite appropriate for the 1938 Resolution to take this position with respect to premium pay. Most per diem employees have their wage

rates determined in accordance with the prevailing rate paid for by private employees for similar work. Cf. *Determination of Wage Rates for Mechanical and Laboring Positions in the Federal Service* (1944), 59 Monthly Labor Review 1063.[9] Thus, the wage scales themselves will provide for a premium for holiday work if that is recognized by the local prevailing wage scale. It was, therefore, quite logical for the 1938 Resolution to remit the question of additional pay for holiday work to wage agreements.

The plain wording of the 1938 Resolution provides for mandatory holiday or gratuity pay only if the employee is prevented from working on a holiday; it does not provide for mandatory gratuity pay to an employee required to work on a holiday. In the absence of any other applicable statutory provision requiring gratuity pay in this situation, it follows that gratuity pay for holiday work is not "provided by law." Consequently, under the very terms of the wage agreement, expressly tied to the statutory requirement of gratuity pay, respondent is not entitled to any payment for his wartime holiday work

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[9] Since the wages of the employees of the Government Printing Office are arrived at by collective bargaining (*supra*, pp. 6–7, 14), they are as a practical matter tied to the prevailing wage. Cf. Appendix C, *infra*, pp. 47–48. See also the Act of January 13, 1883, 22 Stat. 402, which as early as 1883 authorized extra pay for work performed on holidays, *if recognized by the customs of the trade.*

in excess of the night rate paid to him, augmented by a premium pay of 50 percent of the day rate.

B. PETITIONER'S INTERPRETATION OF THE 1938 RESOLUTION IS SUPPORTED BY ITS CONTEMPORANEOUS INTERPRETATION BY THE COMPTROLLER GENERAL AND BY THE COMMITTEE ON REVISION OF THE LAWS OF THE HOUSE OF REPRESENTATIVES

This reading of the 1938 Resolution is supported by the contemporaneous interpretations given to it by the Comptroller General and by the Committee on Revision of the Laws of the House of Representatives which supervises the compilation of the United States Code.

1. *The Comptroller General's interpretation.*— Immediately after the passage of the Joint Resolution of June 29, 1938, various governmental agencies requested the opinion of the Comptroller General concerning the effect of the Resolution on holiday pay. The Comptroller General advised the Public Printer, as early as August 23, 1938, that the payment of gratuity pay for holiday work was no longer required. 18 Comp. Gen. 191, 192. Identical interpretations of the 1938 Resolution were given to the Secretary of the Navy, July 6, 1938 (18 Comp. Gen. 10), the Secretary of War, August 19, 1938 (18 Comp. Gen. 186), and to the Governor of the Panama Canal, August 29, 1938 (18 Comp. Gen. 206).

In this connection, it is significant that respondent's compensation is not fixed by statute but is contractual in character. The statute is

relevant here only because the wage agreement formula of "gratuity pay for the holiday as provided by law" (*supra*, p. 3) incorporates it by reference. If the employees of the Government Printing Office were dissatisfied with the Comptroller General's decision, they could have requested a revision of the pertinent terms of the wage agreement.[10] Their failure to do so must be considered an acquiescence in the ruling of the Comptroller General, or a recognition that compensation for holiday work at 250% of the rate for regular work was not required either by considerations of equity or by the customs of the trade (cf. Act of January 13, 1883, 22 Stat. 402, *infra*, p. 41).[11]

2. *The legislative interpretation.*—The 1940 Edition of the United States Code, prepared under the supervision of the Committee on the Revision of the Laws of the House of Representatives,[12] has also construed the 1938 Resolution as repealing the earlier statutes under which gratuity pay was administratively awarded, and, in effect, as not granting gratuity holiday pay

[10] The agreement may be changed once a year. Act of June 7, 1924, 43 Stat. 658, 44 U. S. C. (1946 ed.) 40.

[11] We believe that the principles of the 1883 Act still govern the collective bargaining process under the Act of June 27, 1924, *infra*, pp. 42–44 (cf. Appendix C, *infra*, pp. 47–48), although it probably has been repealed (*infra*, p. 37).

[12] Act of May 29, 1928, Sec. 2, 45 Stat. 1007, as amended, 1 U. S. C. (1940 ed.) 52 (d). The supervision is now exercised by the Committee on the Judiciary of the House of Representatives, 1 U. S. C. (1946 ed., Supp. IV) 201.

to those per diem employees who work on a holiday." 44 U. S. C. (1940 ed.) 44 has been annotated to the effect that the subject matter of the statute formerly codified in this section, *i. e.*, the Act of January 12, 1895, section 46 (*supra*, p. 18; *infra*, pp. 26, 34–35, 42), is now covered by 5 U. S. C. 86a, *i. e.*, the 1938 Resolution. A note to 5 U. S. C. (1940 ed.) 86[14] is even more explicit. It reads in pertinent part:

> As originally enacted this section also contained a provision relating to pay of employees for work on holidays. Said provision was repealed by Act of June 29, 1938, ch. 818, § 2, 52 Stat. 1247 * * *.

Accordingly, 5 U. S. C. (1940 and 1946 eds.) 86 omits the words "and shall receive the same pay as on other days" which originally appeared in the 1885 Resolution.

While the United States Code is only *prima facie* evidence of the law (1 U. S. C. (1946 ed., Supp. IV) 204), the construction placed by a Committee of the House of Representatives on a recent enactment is entitled to much weight, especially in a situation where the construction is reasonable and plausible and where there is

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[13] The 1946 Edition of the United States Code follows the 1940 Edition.

[14] 5 U. S. C. (1934 ed.) 86 referred to the Joint Resolution of January 6, 1885, 23 Stat. 516, *infra*, pp. 26, 34, 41–42, as amended, which awarded holidays with pay to all *per diem* employees of the Government, including employees of the Government Printing Office.

no inconsistency between the Statutes at Large and the Act. Cf. *Stephan* v. *United States*, 319 U. S. 423, 426; *Hoague-Sprague Corp.* v. *Frank C. Meyer Co.*, 31 F. 2d 583, 586 (E. D. N. Y.); *Balian Ice Cream Co.* v. *Arden Farms Co.*, 94 F. Supp. 796, 801–802 (S. D. Cal.).

These contemporaneous interpretations of the 1938 Resolution by the legislative agency [15] charged with the supervision of the payment of salaries to all governmental employees [16] and of the Committee on the Revision of the Laws of the House of Representatives are entitled to great weight and are not to be overturned unless clearly erroneous. *Inland Waterways Corp.* v. *Young*, 309 U. S. 517; *United States* v. *Jackson*, 280 U. S. 183, 193; *United States* v. *Citizens Loan & Trust Co.*, 316 U. S. 209, 214; *United States* v. *Madigan*, 300 U. S. 500, 506; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315; *United States* v. *American Trucking Associations, Inc.*, 310 U. S. 534, 549; *Adams* v. *United States*, 319 U. S. 312, 314–315; *Edward's Lessee* v. *Darby*, 12 Wheat. 207, 210.

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[15] The General Accounting Office is an agency in the legislative branch of the Government. United States Government Organization Manual 1951–52, p. 34.

[16] Act of July 31, 1894, Sec. 7, 28 Stat. 206, as amended, 31 U. S. C. (1946 ed.) 72.

II

THE LEGISLATIVE HISTORY OF THE 1938 RESOLUTION FAILS TO SUPPORT RESPONDENT'S CLAIM THAT THE RESOLUTION DOES NOT AFFECT HIS RIGHT TO RECEIVE GRATUITY PAY FOR A HOLIDAY ON WHICH HE WORKED

We have shown that the terms of the 1938 Resolution are opposed to the holding below. In addition, we submit that its legislative history fails to support the construction attributed to it by respondent and adopted by the Court of Claims.

A. THE LEGISLATIVE HISTORY OF THE 1938 RESOLUTION INDICATES AN INTENT TO DISCONTINUE THE DIFFERENCES WITH RESPECT TO HOLIDAY WORK BETWEEN PER DIEM AND PER ANNUM EMPLOYEES AND TO DISCONTINUE DOUBLE PAY FOR HOLIDAY WORK

1. For many years, discrimination as to holiday pay existed between Federal per annum employees and their per diem colleagues. Per annum employees, whose salaries are traditionally regarded as payment for every calendar day in the year (whether a workday or non-workday), have always received their regular pay each period, regardless of any holidays on which they are excused from working. On the other hand, until 1880 per diem and hourly employees were not paid for holidays on which they did not work.

An 1880 Resolution eliminated this inequality and prevented holidays from reducing the amount of the regular pay checks of Government Print-

ing Office per diem employees. The Resolution "allowed" these employees specified "legal holidays with pay" and provided "that the said employees shall be paid for these holidays only when the employees of the other government departments shall be so paid." Joint Resolution of April 16, 1880 (21 Stat. 304). *Infra*, p. 41. Five years later, all per diem employees of the Government were also "allowed" specified legal holidays with the "same pay as on other days." Joint Resolution of January 6, 1885 (23 Stat. 516, 5 U. S. C. 86). *Infra*, pp. 41–42. And, in 1895, a Resolution applicable only to Government Printing Office employees "allowed" them eight specified "legal holidays with pay." 28 Stat. 607, Sec. 46, 44 U. S. C. 44. *Infra*, p. 42.

The purpose of these statutes, as has been noted, was to place per diem employees on a par with per annum employees. But the language of the resolutions was interpreted so as to accord per diem employees preferential treatment over per annum employees in two major respects: First, per diem employees were allowed a day's gratuity pay even when a holiday on which they did not work fell on Saturday or Sunday (a nonworkday) so that they received an extra day's pay in addition to the full week's pay otherwise earned. Secondly, if they worked on a holiday, they received a day's gratuity pay in addition to their regular rate of pay for that day. 13 Comp. Gen. 295, 297; 18 Comp. Gen. 186, 187. Per an-

num employees, holding comparable positions, received neither of these benefits. A day's pay was not added to their wages where a holiday occurred on a nonworkday. Nor did they receive any extra gratuity pay for a holiday on which they worked.

On the other hand, per diem employees were limited to the holidays named in the 1885 and 1895 Acts, while their per annum co-workers could obtain the advantage of additional holidays declared by Executive order.

2. The immediate occasion for the enactment of the 1938 Resolution was Executive Order No. 7763 of December 6, 1937, 2 F. R. 2685, which closed the Government offices on December 24, 1937, and excused all employees from work on that day.[17] While this order did not entail a loss of wages for per annum employees, per diem employees could not be paid for that day since the existing legislation—the 1885 and 1895 Acts—authorized a specified number of legal holidays with pay and the 24th of December or a holiday declared by Executive Order was not among them. A Joint Resolution was therefore introduced in the House of Representatives authorizing the payment of compensation to the per diem employees who had lost wages as the result of Executive Order No. 7763. H. J. Res. 551, 75th Cong., 3d sess.

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[17] Cf. H. Rept. No. 2683, 75th Cong., 3d sess. (hereinafter referred to as "Report").

The House Committee on Civil Service, to which the Resolution had been referred, was advised by the Civil Service Commission that the question of holiday pay for per diem workers raised broader issues which should be solved by general legislation, rather than on a piecemeal basis (Report, p. 2). A detailed decision of the Comptroller General to the Secretary of the Navy, included in the Committee Report (17 Comp. Gen. 519; Report, pp. 3–5), compared the effect of holidays on per diem workers and per annum workers.

The Comptroller General's decision disclosed that, as noted above, in one aspect the status of per diem workers was inferior to that of per annum workers. While the latter did not suffer any loss of income as the result of holidays, whether declared by statute or administrative action, per diem workers were entitled to pay only if the holiday was specified by statute; there was no authority to pay them if Government offices were closed by Executive Order. On the other hand, the Comptroller General pointed out, per diem employees were entitled to two benefits denied to per annum employees. While the latter were not entitled to any additional compensation if required to work on a holiday, per diem workers received not only regular pay but double pay. And if the holiday fell on a day on which the per diem worker would not have

worked anyway,[18] he was still considered entitled to holiday pay. Thus, the Comptroller General's decision stated:

> * * * even when any of such holidays falls on a nonwork day (such as a Saturday), such [per diem] employees receive pay for the holiday when no work is performed thereon, in addition to the full week's pay otherwise earned, and double compensation for the day if work is performed thereon. [Report, p. 5; 17 Comp. Gen. 519, 522.] [19]

The draft resolution submitted by the Civil Service Commission,[20] in the same form as it finally became law, appears to us to have been carefully drawn to deal with these various preferences and to equalize the treatment of per diem and per annum workers. The discussion of the Resolution on the floor of the House indicates that its purpose was not to bestow a unilateral gift on the per diem workers but to assimilate their status to that of the per annum employees. 83 Cong. Rec. 9466. Certainly this is the spirit, if not the precise letter, of the 1938 Resolution. It is significant that in 1946 the Public Printer gave effect to this spirit by extending to the employees of the Government Printing Office the benefits of the holiday provisions of the Federal

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[18] *E. g.*, because the holiday fell on a Saturday or other nonworking day.

[19] See also Report at p. 4; 17 Comp. Gen. 519, 521–522.

[20] Report, p. 2.

Employees Pay Act of 1945, Sec. 302,[21] although it is not in terms applicable to them (R. 10, 26).[22]

B. THE COURT OF CLAIMS' VIEW OF THE LEGISLATIVE HISTORY AND PURPOSE OF THE 1938 RESOLUTION IS ERRONEOUS

The court below based its award of double pay, in addition to the 50% extra pay, on the following main considerations: First, it held that, regardless of its broad language, the sole purposes of the 1938 Resolution were to include administrative holidays in the holidays with pay and to discontinue holiday pay if the holiday fell on a nonworking day, and that the Resolution had to be read as if so limited. Second, it refused to ascribe to Congress an intent to permit holiday work without extra pay or to abolish a traditional administrative practice without express and specific words of repeal.

1. The court below and respondent recognize that the 1938 Resolution was not limited to the

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[21] 59 Stat. 298, as amended by the Federal Employees Pay Act of 1946, Sec. 11, 60 Stat. 218, 5 U. S. C. (1946 ed.) 922. The 1946 Act raised the holiday pay from 150% to 200% of the regular rate.

[22] The Federal Employees Pay Act of 1945 applies only to the employees of the Executive branch of the Government and the employees of certain enumerated establishments of the Judicial and Legislative branches which do not include the Government Printing Office (Sec. 101, 59 Stat. 295, 5 U. S. C. (1946 ed.) 901). The Government Printing Office is an establishment of the Legislative branch of the Government. Cf. United States Government Organization Manual, 1951–52, p. 37.

grant to per diem employees of gratuity holiday pay for administrative holidays. They admit that it was also intended to terminate one of the instances in which per diem employees were preferred over per annum employees, namely, the award of holiday pay for holidays occurring on nonwork days (R. 30–31; Respondent's Brief in Opposition, p. 7). There is, however, no justification for this selectivity in finding the aims of the Resolution. We point out above that the Committee Report expressly referred to three instances of inequality between the per diem and the per annum employee. One was to the former's detriment: no pay on administrative holidays (Report, p. 4); and two were to his benefit: double pay for holiday work (Report, pp. 4 and 5) and holiday pay for holidays falling on nonworking days (Report, p. 5). The wording of the Resolution disposes of all three inequalities; and there is no qualitative difference between the three of them. Double pay for holiday work and holiday pay for a holiday falling on a nonworkday appear to be administrative practices of equal antiquity (R. 25, fn. 3). It could be argued with equal force that Congressional intent had exhausted itself in abolishing double pay for holiday work and had left intact holiday pay for holidays falling on nonworkdays. The Committee report mentions both instances of the preferential treatment of per diem employees

with equal emphasis,[23] and the wording of the 1938 Resolution is calculated to eliminate both of them; nothing in the legislative history of the Resolution reveals an intent to discriminate between the two inequalities.

2. The court below may have believed that under the Government's interpretation of the 1938 Resolution an employee who worked on a holiday could receive no more than the same pay as one who did not work (R. 31). The court itself conclusively answered that argument when it awarded respondent 50% extra pay for holiday work. As we have pointed out above (pp. 19–20, 21–22), the 1938 Resolution remits the issue of extra compensation for holiday work to the wage agreement or wage schedule under which the per diem employee works. Respondent's extra compensation for holiday work amounted to 50% until May 28, 1946; since then it has been 100% (R. 26). We submit that the existence of this extra pay is sufficient to rebut the argument that unless petitioner were paid 150% of the daily rate, in addition to the night rate, he would have to receive the same compensation whether or not he worked on a holiday.

3. The court below also placed great stress on the argument that Congress could not be presumed to have intended to deprive the per diem

[23] Actually, double pay for holiday work is mentioned twice (Report, pp. 4, 5) and holiday pay for holidays falling on nonworking days is mentioned only once (Report, p. 5).

employees of the forty-year old benefit of double pay for holiday work without being explicit about it.[24] We argue above (*supra*, pp. 18–19) that this view establishes the impossible condition that, in superseding earlier legislation, Congress must make specific reference to all the incidents and interpretations of the repealed statute. In addition, it is significant that the court's view places too great weight on an administrative ruling which is of very doubtful authority. For the former administrative holding that the payment of double pay for holiday work was required, rather than merely authorized, is highly questionable.

The first statute dealing with holiday pay for per diem workers was the Joint Resolution of April 16, 1880, 21 Stat. 304, *infra*, p. 41, which granted the employees of the Government Printing Office five legal holidays with pay. The occasion for this Joint Resolution was similar to the one which prompted the enactment of the 1938 Resolution. The Public Printer had concluded that he was not authorized to pay printers for New Year's Day, 1880, on which day the Government Printing Office was closed.[25] The

[24] But note that the court below felt less strongly about the equally old administrative practice of granting per diem employees holiday pay for holiday falling on nonworkdays (*supra*, pp. 30–32).

[25] Cf. 10 Cong. Rec. 708; 2170–2171; H. Rep. 585, 46th Cong., 2d sess.; First Comp. Dec., 1 Lawrence 31.

avowed purpose of the 1880 Resolution was to compensate the per diem employees, prevented from working by the occurrence of a holiday, for the loss of income; it was not to grant them additional compensation if they should be required to work on such day.[26]

Three years later, Congress passed the Act of January 13, 1883, 22 Stat. 402, *infra*, p. 41, which authorized the Public Printer to pay "extra prices" for work performed on legal holidays, on Sundays or at night, as the customs of the trade and the justice of the case might require. The very passage of the Act and its express reference to legal holidays indicates the recognition by Congress that the grant of paid holidays did not, by necessary implication, mean that an employee was entitled to double pay for holiday work. The purpose of the 1883 Act was to give the Public Printer discretionary authority to provide for extra compensation (13 Cong. Rec. 6076), not to require him to give it.

The Joint Resolution of January 6, 1885, 23 Stat. 516 (5 U. S. C. (1934 ed.) 86, *infra*, pp. 41–42) extended the benefits of the 1880 Resolution to all per diem employees. The purpose of this bill, again, was to "entitle" these employees "to four or five holidays during the year without losing their pay for those days." 16 Cong. Rec. 411.

The Act of January 12, 1895, 28 Stat. 601,

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[26] Cf. footnote 25.

dealt at length with the Government Printing Office. Sec. 46 (44 U. S. C. (1934 ed.) 44), *infra*, p. 42, provided for eight legal holidays with pay. The pertinent Committee Reports [27] point out that Sec. 46 (Sec. 47 of the bill) was substantially identical with the 1880 Resolution.[28]

It has been stipulated (R. 9), and found by the court below (R. 25), that from 1895 to 1938 per diem workers in the Government Printing Office received double pay for holiday work.[29] We submit that this administrative practice was correct if based on the theory that under the 1883 Act the Public Printer was *authorized* to award extra pay for holiday work, but that there is no justification for the rule that he was under a statutory *duty* to pay double pay for holiday work.

The decision of the Comptroller of the Treasury of November 20, 1901 (8 Comp. Dec. 322; cf. *supra*, p. 26) supposedly furnishes the legal basis for the administrative practice of double pay for holiday work which prevailed until 1938. The decision appears correct to the extent that it answered in the affirmative a question of the Public

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[27] Sen. Rept. No. 18, 52d Cong., 1st sess., p. 437; Sen. Rept. No. 574, 53d Cong., 2d sess., p. 24; H. Rept. No. 7, 53d Cong., 1st sess., pp. 7–8.

[28] This, we believe, disposes of any argument based on differences in the statutory language between the 1880 Resolution and Section 46 of the 1895 Act.

[29] From 1924 to 1938 the holiday pay was 250% the daily rate.

Printer whether he was authorized to award double pay for holiday work. He undoubtedly had this authority under the 1883 Act, and with respect to some categories of employees under Sec. 49 of the 1895 Act (28 Stat. 608).[30]

The Comptroller of the Treasury, however, went further and held that the grant of paid holidays in Sec. 46 of the 1895 Act (44 U. S. C. (1934 ed.) 44) required, by necessary inference, double pay for holiday work. In coming to this result, he may have assumed that the 1883 Act was repealed by the 1895 Act, since the latter was supposed to constitute a codification of the entire law referring to the Government Printing Office and, consequently, was thought to repeal, by implication, all earlier statutes germane to its subject (cf. 15 Comp. Dec. 426 and 473). The 1895 Act, however, did not in terms repeal all pertinent prior legislation, but only those laws which were in conflict with it; hence, the 1883 Act remained in force unless repugnant to the later one. *Cape Girardeau County Court* v. *United States;* 118 U. S. 68, 72. We submit that there is no conflict between the two statutes and that the 1883 Act remained unaffected by the 1895

[30] This section authorized the Public Printer to pay proofreaders and laborers "such rates of wages as he may deem for the interest of the Government and just to the persons employed". This certainly implied the authority to award extra pay for holiday work.

codification. In this, we believe, we are supported by the weight of authority.[31]

To the extent that the administrative practice of granting extra pay for holiday work was based on the statutory authority to pay extra compensation for holiday work, it was clearly correct, and was not affected by the 1938 Resolution. But the theory that the 1895 grant of paid holidays *required,* by necessary implication, the award of double pay for holiday work—without any administrative or collective bargaining implementation—is at variance with the language and history of the 1895 Act.

III

THE WARTIME POLICY OF NON-OBSERVANCE OF HOLIDAYS SUPPORTS DENIAL OF GRATUITY PAY TO PER DIEM EMPLOYEES

In normal times there is ample justification for paying an employee bonus or premium pay when he works on a holiday. Holiday work is more onerous and burdensome than work on a regular weekday. A holiday is a day for religious, patriotic, or recreational pursuits. As-

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[31] Scott and Beaman, *Index Analysis to Federal Statutes 1873–1907*, p. 486 and cf. 1340. 44 U. S. C. A. 40, Historical Note, and *Index to Federal Statutes 1874–1931*, p. 1286, both state that the 1883 Act was repealed only by the Act of June 7, 1924 (*infra*, pp. 42–44). There may be some argument to the effect that it survived even that statute, since it is silent on Sunday and holiday work.

signment to holiday work involves on the part of the employee a departure from the normal way of living. These considerations justify payment of premium pay to those federal employees who are required to work when other federal employees are excused from work and allowed to enjoy an uninterrupted holiday without any loss of pay.

The court below, however, completely overlooked the fact that during wartime none of these considerations is pertinent. Perhaps one of the least inconveniences in World War II was that suffered by civilian employees who had to give up their holidays so as to attain the maximum output needed for waging a successful war. The 1943 Presidential directives, declaring this need, required all civilian government employees to work on all holidays throughout the war with the exception of Christmas. *Supra,* pp. 4–6. The normal peacetime holidays were thus converted into regular workdays and employees generally were required to work on those days "without additional compensation". (Presidential directive, December 17, 1943, *supra,* pp. 5–6).

This policy of allowing gratuity pay for holiday work in peacetime (where such work is unusual) and of prohibiting it in wartime (when holidays are regular workdays) is reflected in the Federal Employees' Pay Act of 1945. That Act, which became law after VE-Day, but before VJ-Day, provided that its provision for premium

pay for holiday work should not take effect until "cessation of hostilities in the present war." 59 Stat. 298, Sec. 302, 5 U. S. C. 922. Postponement of the effective date of the premium pay provision was necessary because of express Congressional recognition of the policy that during World War II, "all holidays, except Christmas, are regular workdays." H. Rep. 726, 79th Cong., 1st sess., p. 13.[32] Since the holidays involved in the instant litigation were regular wartime workdays, it is apparent that the decision below allowing premium pay conflicts with well-established policy allowing such pay only for peacetime holidays in fact. Cf. *Di Benedetto* v. *United States,* 108 C. Cls. 18, certiorari denied, 332 U. S. 763. In doing so, the Court of Claims has placed per diem employees in a superior status expressly denied to per annum employees by consistent legislative and administrative policy. Nothing in the terms or history of the 1938 Resolution warrants this discrimination. On the contrary, there is neither legal nor equitable justification for overriding the express language of the 1938 Resolution in order to award respondent extra compensation for holiday work which is completely out of line with the wage policies prevailing at the time the work was performed.

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[32] This Report accompanied H. R. 3393, which became the Federal Employees' Pay Act of 1945.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the judgment below is erroneous to the extent that it awards respondent double pay for holiday work in addition to the contractual 50% extra pay and, accordingly, should be reversed *pro tanto*.

PHILIP B. PERLMAN,
Solicitor General.
HOLMES BALDRIDGE,
Assistant Attorney General.
PAUL A. SWEENEY,
SAUL R. GAMER,
HERMAN MARCUSE,
Attorneys.

NOVEMBER 1951.

APPENDIX A

1. The Joint Resolution of April 16, 1880 (21 Stat. 304) provided:

> * * * That the employees of the Government Printing Office shall be allowed the following legal holidays with pay, to wit: the first day of January, the twenty-second day of February, the fourth day of July, the twenty-fifth day of December, and such day as may be designated by the President of the United States as a day of public fast or thanksgiving: *Provided,* That the said employees shall be paid for these holidays only when the employees of the other government departments shall be so paid: *And provided further,* That nothing herein contained shall authorize any additional payment to such employees as receive annual salaries.

2. The Act of January 13, 1883, 22 Stat. 402, provided:

> * * * That for extra work, ordered in emergencies, and performed on Sundays or legal holidays, or between the hours of midnight and eight ante meridian, excepting that done by regular organized night forces, the Public Printer is hereby authorized to pay such extra prices as the customs of the trade and the justice of the case may require.

3. The Joint Resolution of January 6, 1885 (23 Stat. 516, as amended by the Joint Resolution

of February 23, 1887, 24 Stat. 644, 5 U. S. C. (1934 ed.) 86) provided:

> *Holidays; for per diem employees.*—The employees of the Navy Yard, Government Printing Office, Bureau of Printing and Engraving, and all other per diem employees of the Government on duty at Washington, or elsewhere in the United States shall be allowed the following holidays, to wit: The 1st day of January, the 22nd day of February, the day of each year which is celebrated as "Memorial" or "Decoration Day", the 4th day of July, the 25th day of December, and such days as may be designated by the President as days for national thanksgiving, [and shall receive the same pay as on other days.][1]

4. The Act of January 12, 1895, Sec. 46 (28 Stat. 607, 44 U. S. C. (1934 ed.) 44) provided:

> *Holidays.*—The employees of the Government Printing Office shall be allowed the following legal holidays with pay, to wit: The 1st day of January, the 22nd day of February, the 4th day of July, the 25th day of December, Inauguration Day, Memorial Day, Labor's Holiday, and such day as may be designated by the President of the United States as a day of public fast or thanksgiving.

5. The Act of June 7, 1924 (43 Stat. 658, 44 U. S. C. 40) provides:

> * * * That on and after July 1, 1924, the Public Printer may employ, at such rates of wages and salaries, including com-

[1] The words in brackets have been omitted in 5 U. S. C. (1946 ed.) 86. Cf. *supra*, p. 23.

pensation for night and overtime work, as he may deem for the interest of the Government and just to the persons employed, except as otherwise provided herein, such journeymen, apprentices, laborers, and other persons as may be necessary for the work of the Government Printing Office; but he shall not, at any time, employ more persons than the necessities of the public work may require or more than two hundred apprentices at any one time: *Provided,* That on and after July 1, 1924, the minimum pay of all journeymen printers, pressmen, and bookbinders employed in the Government Printing Office shall be at the rate of 90 cents an hour for the time actually employed: *Provided further,* That except as hereinbefore provided, the rates of wages, including compensation for night and overtime work, for more than ten employees of the same occupation shall be determined by a conference between the Public Printer and a committee selected by the trades affected, and the rates and compensation so agreed upon shall become effective upon approval by the Joint Committee on Printing; if the Public Printer and the committee representing any trade fail to agree as to wages, salaries, and compensation either party is hereby granted the right of appeal to the Joint Committee on Printing, and the decision of said committee shall be final; the wages, salaries, and compensation determined as provided herein shall not be subject to change oftener than once a year thereafter: *Provided further,* That employees and officers of the Government Printing Office, unless otherwise herein fixed, shall continue to be paid at the rates of wages, salaries, and compensation (including night rate) now author-

ized by law until such time as their wages, salaries, and compensation shall be determined as hereinbefore provided.

SEC. 2. All Acts or Parts of Acts in conflict with the provisions of this Act are hereby repealed.

APPENDIX B

154–49299 SEPTEMBER 6, 1951.

PUBLIC PRINTER,
Government Printing Office,
Washington 25, D. C.

Re: *United States* v. *John Stuart Kelly et al.*, No. 209, Supreme Court

DEAR SIR: I have received a letter from Mr. Henry J. Fox, counsel for respondents in the above-entitled case, in which he requests that I advise you of the exact question in respect of which the Government is seeking Supreme Court review. As you know, the above case was brought in the Court of Claims by Kelly and 613 other Government Printing Office employees to recover additional pay for certain "holidays" on which they worked during World War II. They had been paid only the regular rate of pay for those days and claimed

(a) an additional 50% of the day rate for each "holiday" worked, and

(b) an additional day's pay as gratuity pay for each "holiday" worked.

In the Court of Claims the Government contended that the employees were not entitled to either (a) or (b) and urged that they should receive no more than they had already been paid—that is, the regular rate of pay. The Court of Claims, rejecting the Government's con-

tentions, ruled that the employees were entitled to both (a) and (b). Judge Whitaker, in a dissenting opinion in which Chief Judge Jones concurred, accepted our argument that the employees were not entitled to (b), but agreed with the majority that they were entitled to (a).

If certiorari is granted by the Supreme Court, we infend to urge that the Court of Claims erred in awarding the employees (b). We do not intend to raise any question in the Supreme Court as to whether the Court of Claims properly awarded them (a). The petition for certiorari we filed in the Supreme Court is so limited. A copy of that petition is enclosed.

Sincerely yours,

(S) Philip B. Perlman,
PHILIP B. PERLMAN,
Solicitor General.

Enclosure No. 91192.

APPENDIX C

UNITED STATES GOVERNMENT PRINTING OFFICE,
Washington 25, D. C., March 21, 1951.

Office of
The Public Printer

Honorable CARL HAYDEN, *Chairman,*
Joint Committee on Printing,
U. S. Senate,
Washington 25, D. C.

MY DEAR SENATOR HAYDEN: In accordance with the provisions of the Kiess Act, Title 44, Section 40 of the U. S. Code, wage conferences have been concluded with a committee representing the journeymen of our Composing Division—approximately 1300 employees.

The present rate for these employees in the Government Printing Office is $2.43 an hour. The weighted averaged in the 25 cities is $2.51. The Washington D. C. book and job scale is $2.54.

In accordance with the formula of paying either the weighted average of the 25 largest cities in the country or the local rate, whichever is the greater, I would recommend that the journeymen craftsmen in our Composing Division be paid at the rate of $2.54 an hour, that the present method of computing night and overtime rates be continued, and that the new rate become effective tomorrow, March 22, 1951.

This fits the formula and also makes for harmonious working conditions by not forcing our employees to work for less than the local rate of compensation.

Respectfully,

(S) John J. Deviny,
JOHN J. DEVINY,
Public Printer.

March 21, 1951.

Offer of Public Printer approved at the direction of the Joint Committee on Printing.

(S) CARL HAYDEN,
Chairman, Joint Committee on Printing.

U. S. GOVERNMENT PRINTING OFFICE: 1951

Office-Supreme Court, U. S.
FILED
SEP 7 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 209

UNITED STATES, PETITIONER,

v.

JOHN STUART KELLY, ET AL., RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Claims

BRIEF FOR RESPONDENTS IN OPPOSITION

HENRY J. FOX,
Counsel for Respondents.

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Washington 6, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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OCTOBER TERM, 1951

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UNITED STATES, PETITIONER,

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On Petition for a Writ of Certiorari to the United States Court of Claims

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 22-37) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on May 1, 1951 (R. 37-38). Petitioner invokes jurisdiction of this Court under 28 U. S. C. § 1255(1).

QUESTION PRESENTED

Whether hourly rate employees of the Government Printing Office were entitled to holiday pay under the Joint Resolution of June 29, 1938, whenever they were required to work on a holiday occurring on a regular work day.

STATUTES AND CONTRACT PROVISION INVOLVED

1. Joint Resolution of April 16, 1880, No. 22, 21 Stat. 304. This Joint Resolution provided:

> Employees of the Government Printing Office shall be allowed the following legal holidays with pay, to wit: the 1st day of January, the 22d day of February, the 4th day of July, the 25th day of December, and such days as may be designated by the President of the United States as a day of public fast or thanksgiving: *Provided* that the said employees shall be paid for these holidays only when the employees of the other government departments shall be so paid. * * *.

2. Joint Resolution of January 6, 1885, No. 5, 23 Stat. 516, as amended by the Joint Resolution of February 23, 1887, No. 6, 24 Stat. 644. This Joint Resolution provides:

> The employees of the Navy Yard, Government Printing Office, Bureau of Printing and Engraving, and all other per diem employees of the Government on duty at Washington, or elsewhere in the United States, shall be allowed the following holidays, to wit: The 1st day of January, the 22d day of February, the day of each year which is celebrated as "Memorial" or "Decoration Day", the 4th day of July, the 25th day of December, and such days as may be designated by the President as days for national thanksgiving, and shall receive the same pay as on other days.

3. Act of January 12, 1895, c. 23, § 46, 28 Stat. 607, 44 U. S. C. § 44. This Act provides:

> The employees of the Government Printing Office shall be allowed the following legal holidays with pay, to wit: The 1st day of January, the 22d day of Febru-

ary, the 4th day of July, the 25th day of December, Inauguration Day, Memorial Day, Labor's Holiday, and such day as may be designated by the President of the United States as a day of public fast or thanksgiving.

4. The Joint Resolution of June 29, 1938, c. 818, 52 Stat. 1247, 5 U. S. C. § 86a. Section 1 of the Joint Resolution provides:

> Whenever regular employees of the Federal Government whose compensation is fixed at a rate per day, per hour, or on a piece-work basis are relieved or prevented from working solely because of the occurrence of a holiday such as New Year's Day, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day or any other day declared a holiday by Federal statute or Executive Order, or any other day on which the departments and establishments of the Government are closed by Executive order, they shall receive the same pay for such days as for other days on which an ordinary day's work is performed.

5. The pertinent section of the holiday rate provision of the wage agreement of October 27, 1924, which was in effect at all times material hereto follows:

> *Holiday Rate.* Employees required to work on a legal holiday or a special holiday declared by Executive Order shall be paid at the day rate plus 50 per cent for all the time actually employed in addition to their gratuity pay for the holiday as provided by law;
> * * *

STATEMENT

This case was presented to the United States Court of Claims upon a stipulation of facts agreed to by counsel for plaintiffs and defendant. Although the stipulation in this case pertained only to the claim of plaintiff John Stuart Kelly, hereafter referred to as Kelly, the questions of law and fact are common to all plaintiffs in this action (R. 5).

The Public Printer regularly employed Kelly as a journeyman printer in Washington, D. C., from September 1, 1943, to October 15, 1945 (R. 6). Kelly's compensation was fixed by a wage agreement negotiated by the Public Printer and a committee of employees representing the journeyman printers of the Government Printing Office (R. 6).[1] Kelly was required to and did work 8 hours on each of the following holidays (R. 7):

September 6, 1943	Labor Day
November 11, 1943	Armistice Day
November 25, 1943	Thanksgiving Day
February 22, 1944	Washington's Birthday
May 30, 1944	Memorial Day
July 4, 1944	Fourth of July
September 4, 1944	Labor Day
November 23, 1944	Thanksgiving Day
January 1, 1945	New Year's Day
February 22, 1945	Washington's Birthday

For work performed on each of the above holidays, Kelly received only the same rate of pay as for work performed on an ordinary eight hour day, including the night differential when applicable (R. 7-8).

On April 23, 1948, Kelly submitted a claim to the Acting Public Printer requesting additional compensation for hours he was required to work on the above holidays in accordance with the holiday rate provision of the wage agreement. Thereafter, this claim was forwarded to the Comptroller General's office (R. 8). On March 28, 1949, the Comptroller-General in an "obviously surprising" decision denied Kelly's claim and ruled that he was only

[1] The Joint Committee on Printing created by the Act of January 12, 1895, 28 Stat. 601, 44 U. S. C. § 1, consists of three members of the Senate and three members of the House of Representatives. The wage agreement of October 27, 1924, which included the holiday rate provision set out above, was entered into and approved by the Joint Committee on Printing under the authority of and pursuant to the Act of June 7, 1924, 43 Stat. 658, 44 U. S. C. § 40.

entitled to receive "exactly the same pay as those who were not required to work." (R. 30).

Kelly's suit in the court below was based upon two separate and distinct claims. One claim was for the payment of premium pay for hours of work performed on statutory holidays in accordance with the wage agreement of October 27, 1924. Although Petitioner contended below that § 23 of the Act of March 28, 1934,[2] prohibited the payment of premium pay for work on holidays falling within the regular forty-hour work week, it now concedes that Kelly is entitled to such premium pay (Pet. Br. 10). The second claim was for statutory holiday pay in accordance with the Joint Resolution of June 29, 1938, and the Act of January 12, 1895, *supra*, pp. 2-3. With respect to this claim, Petitioner contended that the Joint Resolution of June 29, 1938, eliminated the legal basis for the payment of holiday pay when Kelly was required to work on statutory holidays.

The court below rendered judgment in favor of Kelly on both claims. The court unanimously agreed that Kelly was entitled to premium pay for hours worked on holidays in accordance with the wage agreement of October 27, 1924. Two judges dissented from the majority opinion awarding Kelly holiday pay when he was required to work on statutory holidays. However, even the dissenting opinion conceded that "It seems inequitable that an employee who does not work on a holiday should receive a full day's pay, whereas an employee who is required to work shall be paid only time and a half, or 50 per cent more than is received by the one who does not work; * * *." (R. 36).

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[2] Act of March 28, 1934, c. 102, Title II, § 23, 48 Stat. 522, 5 U. S. C. § 673c.

ARGUMENT

I. Wage Rate Employees of the Government Printing Office Who Are Required to Work on Statutory Holidays Occurring on Regular Work Days Are Entitled to Holiday Pay.

The Joint Resolution of June 29, 1938, provides holiday pay "whenever regular employees of the Federal Government whose compensation is fixed at a rate per day, per hour, or on a piece-work basis [3] are relieved or prevented from working solely because of the occurrence of a holiday such as New Year's Day, Washington's Birthday, * * *." Petitioner contends that the literal words of the Joint Resolution of June 29, 1938, deprived Kelly of his holiday pay when he was required to work on one of the designated statutory holidays because he was not "relieved or prevented from working solely because of the occurrence of a holiday." The court below rejected Petitioner's contention on the basis of prior judicial decisions, the legislative history of the Joint Resolution of June 29, 1938, and the traditional policy of the Government with respect to similar holiday pay statutes in *pari materia*.

A. The limitation in the Joint Resolution of June 29, 1938, is solely for the purpose of eliminating holiday pay for holidays which occur on nonwork days.

The Joint Resolution of June 29, 1938, was enacted to correct an injustice to wage rate employees which grew out of an Executive Order, dated December 6, 1937, excusing federal employees from duty on December 24, 1937.[4] Since the Executive Order failed to provide pay for the holiday, wage rate employees lost their wages for the day (R. 19). To remedy this situation, Mr. Ramspeck intro-

[3] The term "wage rate" employees, as used in this brief, includes per diem, per hour and piecework employees.

[4] Executive Order No. 7763, dated December 6, 1937; see H. R. Rep. No. 2683 (1938), 75th Cong., 3d Sess. (R. 19).

duced a resolution[5] in the House of Representatives, providing compensation for such employees who were excused from duty on that day. This resolution was referred to the Committee on Civil Service which recommended a substitute resolution ultimately enacted by Congress (R. 29). Petitioner's brief creates the misimpression that the original resolution was amended because "the language of the Resolution as introduced was not broad enough to eliminate * * * preferential treatment" accorded wage rate employees (Pet. Br. 13). However, the Committee Report, as well as both the majority (R. 29, 30) and the dissenting (R. 36) opinions of the court below unequivocally demonstrate that the actual reason for the amendment was that holiday pay for Executive Order holidays presented a recurring problem which should be solved by "a permanent law to take care of such similar situations that may arise in the future."[6]

At the same time that Congress undertook to extend and enlarge the holiday benefits of wage rate employees[7], it also eliminated the right of such employees to holiday pay for holidays occurring on nonwork days which they had received under interpretations of prior holiday statutes. As the court below found, Congress selected apt words to accomplish this single limitation (R. 30). Petitioner seeks, without basis, to extend the scope of the limitation to deprive Kelly of his holiday benefits which wage rate employees had enjoyed for over 55 years.[8] The court below pointed out:

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[5] H. J. Res. 551, introduced on January 5, 1938; 75th Cong., 3d Sess. (1938).

[6] Committee Report No. 2683, to H. J. Res. 551, 75th Cong., 3d Sess. (1938).

[7] The Joint Resolution of June 29, 1938, increased the number of paid holidays and provided holiday pay for many groups of wage rate employees not previously entitled to such pay.

[8] Petitioner's brief refers to a letter from the Acting Comptroller General to the Secretary of the Navy, reprinted in the report of the House Committee on Civil Service, in support of its position. The

> The Civil Service Commission and the House Committee in enlarging the scope of the resolution obviously had noted the Comptroller General's comment, quoted in the committee report, that the existing legislation had been so interpreted as to give employees pay for a holiday coming on a day when they would not have worked anyway. To prevent that unduly generous treatment, the language "whenever * * * employees * * * are relieved or prevented from working solely because of the occurrence of a holiday" was inserted. The words were apt for that purpose. * * * They had a purpose and were, for that purpose well chosen. We are asked only to hold that they should not be given an additional application, which, taken literally, they could receive, when all the indications are that they were not meant to have it. (R. 30-31).

Although wage rate employees are no longer entitled to holiday pay for holidays occurring on a nonwork day, it is clear that they are entitled to such pay when they are required to work on a holiday occurring on a regular work day. "The evil which Congress meant to cure by the words it used, it cured. The additional effect contended for by the Government would destroy a practice which no one had ever even intimated to be an evil, and which responsible officials had, for more than forty years, regarded as just and necessary." (R. 31).

The unwarranted limitation of traditional holiday benefits which Petitioner seeks to attribute to the Joint Resolution of June 29, 1938, moved the court below to make the following comment:

> It is completely unthinkable that the owner of a printing shop could, by practice, or by contract, maintain the policy as to holiday pay which the Government

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passage cited refers to "double compensation for the [holi]day if work is performed thereon." This passage wholly fails to support Petitioner's position since it only refers to compensation for holidays which occur on nonwork days. Admittedly, Congress intended to, and did in fact alter this situation.

here seeks to attribute to Congress. Such an employer, might, and many employers did, in 1938, have a policy of not paying for holidays not worked. If the holiday was worked, it was paid for. Some such employers then, and most of them now have contracts with their employees providing for paid holidays, but in all such contracts there is a provision that if the holiday is in fact worked, it will be paid for again, usually at premium pay, and in addition to the holiday pay. But in no case which we have heard of, or can imagine, could an employer maintain a practice whereby an employee who worked on a holiday received merely the same pay as one who did not work. (R. 31).[9]

The decision below is consistent with the settled rule that where a literal interpretation of a statute leads to harsh or inequitable results,[10] the court will "resort to the policy" of the law "to ameliorate its seeming harshness or to qualify its apparent absolutes * * *." *Markham v. Cabell*, 326 U. S. 404, 409 (1945).

B. The legislative history of the Joint Resolution of June 29, 1938, demonstrates that its purpose was to broaden the scope of previous holiday pay statutes.

Petitioner contends that the purpose and background of the Joint Resolution of June 29, 1938, support its position that holiday pay is limited to holidays when wage-rate employees are not required to work (Pet. Br. 10). There is

[9] Traditionally, wage rates and working conditions of Government Printing Office employees have been comparable to those prevailing in private industry. See Act of January 13, 1883, c. 23, 22 Stat. 402.

[10] The absurd and inequitable consequences of Petitioner's literal interpretation of the Joint Resolution of June 29, 1938, are revealed in decisions of the Comptroller General. For example, in decision A-97265 (August 29, 1938) the Comptroller General held that unless an employee is in fact, ready, willing, and able to go to work on a statutory holiday, he is not entitled to holiday pay under the Joint Resolution of June 29, 1938, despite the fact that his department did not work on that day.

not a shred of evidence in the legislative history of the Joint Resolution of June 29, 1938, which remotely indicates an intent to deprive wage rate employees of their traditional holiday pay which they received when they were required to work on a holiday. The court below pointed out:

> One has immediate doubts as to whether Congress, in 1938, intended to take away from this class of Government employees these rights which they had enjoyed at least since 1895. And when one examines the origin and purpose of the legislation, he finds not the remotest intimation of any such intent. (R. 30).

Contrary to Petitioner's contention, the legislative history of the Joint Resolution of June 29, 1938, clearly demonstrates that Congress intended to improve substantially the holiday status of wage rate employees,[11] characterized by Mr. Ramspeck on the floor of the House during passage of the Joint Resolution, as "the lowest-paid group of employees in the Government service." 83 Cong. Rec. 9466 (1938).

Petitioner argues that the Joint Resolution of June 29, 1938, "carried out the intent of the original resolution and made it plain that per diem employees were entitled to gratuity pay only when they did not work on a holiday." (Pet. Br. 14). Petitioner's failure to designate which reso-

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[11] H. R. Rep. No. 2683, 75th Cong., 3d Sess. 2 (1938) contains a letter from Harry B. Mitchell, President of the Civil Service Commission to Congressman Ramspeck which states: "It is believed that the President had in view that the benefits of the holiday be accorded to all classes of employees to the greatest extent possible. The accounting authorities, however, have held that in the absence of specific legislation the regular employees of the Federal Government whose compensation is fixed at a rate per day, per hour, or on a piece-work basis lose pay for that day. This has resulted in discrimination against these groups of Federal employees * * *" (R. 20).

lution it deems the "original resolution" [12] is immaterial, since none of the prior holiday statutes support Petitioner's construction of the Joint Resolution of June 29, 1938. The Joint Resolution of April 16, 1880, which "allowed" Government Printing Office employees designated statutory holidays with pay contained the proviso that they should "be paid for these holidays only when the employees of the other Government departments shall be so paid." The court below pointed out that this proviso was interpreted to limit holiday pay to a holiday which "fell on a day which would otherwise have been a working day." [13] (R. 27). In any event the Joint Resolution of January 6, 1885, and the Act of January 12, 1895, *supra*, pp. 2-3, did not contain provisos limiting holiday pay to holidays occurring on regular work days.

None of the holiday statutes prior to June 29, 1938, in *haec verba*, specifically granted employees the right to holiday pay whenever they were required to work on one of the designated holidays. They merely "allowed" [14] wage rate employees designated holidays with pay. Nevertheless, such employees who were required to work on statutory holidays were entitled to holiday pay in addition to regular pay for the day's work. This practice was consistently followed by the Government for over 55 years

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[12] Although Petitioner apparently considers the Joint Resolution of April 16, 1880, to be the "original resolution", (Pet. Br. 11, 14) it relies upon and quotes the language of the dissenting opinion (Pet. Br. 14) which designates the Joint Resolution of January 6, 1885, as the "original resolution." (R. 36).

[13] See 1 Comp. Gen. Treas. 31 (1880).

[14] Fifty years ago, it was established that a wage rate employee who was "allowed" a holiday under the Act of January 12, 1895, was automatically relieved and prevented from working except when the exigencies of the situation required his services on such day. It is clear that the phrase "relieved and prevented" in the Joint Resolution of June 29, 1938, is equivalent to the term "allow" in prior holiday statutes. See 8 Comp. Gen. Treas. 322 (1901).

and was affirmed several times by the Comptroller General of the Treasury [15] and the United States Court of Claims.[16] The consistent background of legislative policy and administrative practice [17] prior to 1938 demonstrates unequivocally that Congress intended the Joint Resolution of June 29, 1938, to continue the traditional practice of paying wage rate employees holiday pay whenever they worked on a statutory holiday occurring on a regular work day.

C. The Comptroller General's interpretation of the Joint Resolution of June 29, 1938, is entitled to no weight.

The Comptroller General's interpretation of the literal words of the Joint Resolution of June 29, 1938, limits holiday pay to wage rate employees when they are absent from work solely because of the occurrence of a holiday.[18] Petitioner argues that this interpretation is entitled to great weight as an administrative construction which should not be overturned unless it is "clearly wrong, or unless a different construction is plainly required." (Pet. Br. 15). As a technical matter it is never possible for the occurrence of a holiday to be the "sole" cause for excusing employees from working on such a day. It is the executive head of a department who relieves or prevents the employees from

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[15] 8 Comp. Gen. Treas. 322 (1901); 13 Comp. Gen. Treas. 40 (1906); See also 3 Dec. C. G. 411 (1924).

[16] In Emmett L. Adams v. The United States, 42 C. Cls. 191, 212 (1907), it was pointed out that:

> "* * * when the statute declares certain days to be holidays and provides that certain employees shall receive the same pay as on other days, they are thereby exempt from work, with pay, on such days. That being so, to require them to work on such days at their ordinary rate of pay would be depriving them of the benefit of such statute."

[17] United States v. Missouri Pacific Railroad Company, 278 U. S. 269 (1929).

[18] 18 Comp. Gen. 1; 18 Comp. Gen. 186; 18 Comp. Gen. 191.

working on the holiday,[19] not the mere occurrence of the holiday. Thus it is necessary that there be a concurrence of a designated holiday with some affirmative or negative expression from the executive head of the department relieving and preventing the employees from working on such day. It is clear that the Comptroller General's literal construction renders the Joint Resolution of June 29, 1938, a nullity. Since it is presumed that Congress would not enact a statute which would be utterly ineffective, such construction is entitled to no weight and was rejected by the court below as clearly wrong. Cf. *Oates* v. *First Nat. Bank*, 100 U. S. 239 (1879).

In any event, the Comptroller General's construction is entitled to little weight in the absence of reliance thereon by the public. Sutherland, *Statutory Construction*, Vol. 2, 3rd ed. (1943) 520. In the instant case such requisite reliance by the public was not present. Finally, since the Comptroller General's interpretation of the Joint Resolution of June 29, 1938, is inconsistent with long settled administrative and judical construction of holiday statutes applicable to wage rate employees, it should be ignored.

D. Congress did not intend the Joint Resolution of June 29, 1938, to deprive wage rate employees of holiday benefits in order to equalize the holiday status of wage rate and per annum employees.

Petitioner's suggestion that Congress intended to deprive wage rate employees of long standing holiday benefits in order to eliminate discrimination against per annum employees (Pet. Br. 11) is wholly without basis. Petitioner argues that wage rate employees are placed "in a superior status expressly denied to per annum employees." (Pet.

[19] The executive heads of Government departments have the authority to require employees to work on holidays. See Act of Mar. 3, 1893, c. 211, § 5, 27 Stat. 715, 5 U. S. C. § 29.

Br. 17). The court below disposed of this unfounded argument with the following language:

> The Government suggests that the fact that per annum employees at that time, received no extra pay when they were required to work on a holiday was a discrimination, which the Government's interpretation would eliminate. But that difference had existed for some forty-five years, no mention had been made of it in connection with this legislation, and there is no basis whatever for thinking that Congress intended to treat it. It was apparently, a recognized difference between the status of a per annum employee with his relatively secure tenure, and a per diem craftsman. (R. 31).

The distinction between the methods of compensating per annum employees and wage rate employees has existed for many generations. The United States Civil Service Commission has pointed out that per annum employees were paid for every day of the year including work days and nonwork days. They receive their regular pay each pay period, regardless of Saturdays, Sundays or holidays on which they are excused from working.[20] (Pet. Br. 11). On the other hand, wage rate employees are not paid for Saturdays or Sundays, unless they are required to work on such days. The holiday pay which they receive for a limited number of holidays is provided by statute. It is apparent that if any discrimination exists, it is in favor of per annum employees. Thus, there is not even a remote basis upon which to ground an assumption that Congress intended the Joint Resolution of June 29, 1938, to remedy

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[20] *Digest of Provisions of Law Fixing Pay For Employees in the Executive Branch of the Federal Government*, at p. 93. Under the War Overtime Pay Act of 1943, providing extra compensation for per annum employees who were required to work overtime, the extra compensation was computed on the basis of straight time hourly rates which were derived by dividing the per annum rates by 2,880 (360 x 8). This was on the principle that a per annum rate was basic payment for 360 days of 8 hours each.

a discrimination *against per annum employees*. Indeed, Petitioner's construction of the Joint Resolution of June 29, 1938, would deprive wage rate employees of holiday benefits which per annum employees presently receive. Per annum employees required to work on a holiday designated by statute now receive double compensation for the day.[21]

Petitioner contends further that Section 2 of the Joint Resolution of June 29, 1938,[22] supports its view that Congress intended to equalize the holiday-pay status of wage rate and per annum employees. There is no merit to this contention[23] since Section 2 repeals prior holiday statutes only to the extent that they are inconsistent or in conflict with the Joint Resolution. Since prior holiday statutes create and allow the holidays referred to in the Joint Resolution of June 29, 1938, it is clear that they must be read in *pari materia*. In *Di Benedetto* v. *United States*, 108 C. Cls. 18, 24, 25 (1947), *cert. denied* 332 U. S. 763, it was recognized that the Joint Resolution of June 29, 1938, did not repeal, but merely modified the Joint Resolution of January 6, 1885.

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[21] Act of June 30, 1945, c. 212, Title III § 302, 59 Stat. 298, as amended May 24, 1946, c. 270, § 11, 60 Stat. 218, 5 U. S. C. § 922.

[22] Section 2 of the Joint Resolution of June 29, 1938, provides: "The Joint Resolution of January 6, 1885, U. S. C., Title 5, sec. 86, and all other laws inconsistent or in conflict with the provisions of this act are hereby repealed to the extent of such inconsistency or conflict."

[23] The court below disposed of Petitioner's contention as follows: "* * * we do not agree with the Government's argument that the repealer provision of the 1938 Resolution, in some way not quite clear to us, supports the Government's interpretation of the Resolution." (R. 32).

II. The Government Policy of Working Employees on Holidays During the War Period Did Not Prohibit the Payment of Holiday Pay to Wage Rate Employees Who Were Required to Work on Statutory Holidays.

Petitioner claims that the court below overlooked a memorandum dated May 12, 1943, which was sent to the heads of executive departments and agencies by W. H. McReynolds, Administrative Assistant to the President, declaring the wartime need for maximum output in all Government activities (Pet. Br. 16).[24] Despite the fact that Petitioner failed to mention the memorandum in its brief or argument in the court below, it now relies for the first time upon the memorandum to support its construction of the Joint Resolution of June 29, 1938. The memorandum requested the heads of executive departments and agencies to require federal employees to work on all days normally observed as holidays with the exception of Christmas. It was completely silent with respect to holiday pay for employees who worked on such days. On December 17, 1943, a similar memorandum[25] was sent to heads of executive departments and agencies.[26] This memorandum contained the observation "that holiday work is performed by Federal employees without addi-

[24] The memorandum of May 12, 1943, referred to by Petitioner as a "Presidential Directive" was merely a circular letter sent out over the signature of W. H. McReynolds, Administrative Assistant to the President, to the heads of executive departments and agencies, at the direction of the President.

[25] The memorandum of December 17, 1943, was also sent out over the signature of W. H. McReynolds.

[26] Neither memorandum was published in the Federal Register. There is nothing in the record, nor is there any other evidence which indicates that this or the May 12, 1943, memorandum was sent to the Public Printer, who is the head of an Independent Establishment as distinct from an Executive Department or Agency. See United States v. Allison, 91 U. S. 303 (1876), re status of Government Printing Office.

tional compensation." (Pet. Br. 5) This comment obviously referred to the holiday pay status of per annum employees.[27] It did not and could not refer to wage rate employees, because their holiday benefits were granted by statute. Petitioner's own citation to the *Digest of Provisions of Law Fixing Pay For Employees in the Executive Branches of the Federal Government*, March, 1945, at p. 94 confirms this distinction between the holiday pay status of per annum and wage rate employees. It is highly significant that the sole reference to McReynolds' memorandum is in a footnote to a summary of holiday provisions relating to per annum employees. A separate section of the same *Digest*, at p. 96, which lists statutory holiday provisions for wage rate employees, makes no reference to McReynolds' memoranda.

In *Di Benedetto* v. *United States, supra*, at p. 24, the distinction between the holiday pay status of per annum and wage rate employees was brought into sharp focus. Although the court denied holiday pay to *per annum* employees in that case, it clearly indicated that if the holiday statutes applicable to wage rate employees had also been applicable to per annum employees, they would have been entitled to holiday pay. The court pointed out, in that case, that "this legislation[28] has not, of course, any direct application to the plaintiff, who is paid on a per annum basis, since it is limited to per diem employees."

Petitioner does not rely upon McReynolds' memoranda as a bar to payment of holiday pay for work on statutory holidays. It merely invokes the memoranda to support its

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[27] The Act of March 3, 1893, as amended by the Act of March 15, 1898, 5 U. S. C. § 29, gave discretion to the heads of executive departments and agencies to require per annum employees to work on days normally observed as holidays, and required that such additional work must be without additional compensation.

[28] Joint Resolution of January 6, 1885, as modified by the Joint Resolution of June 29, 1938.

construction of the Joint Resolution of June 29, 1938.[29] Its contention that the Joint Resolution of June 29, 1938, should be construed in the light of an unrelated wartime policy promulgated five years later, is a novel theory unsupported by logic or precedent.

Finally, the *Di Benedetto* case *supra*,[30] as well as a decision of the Comptroller General of the United States, establishes that McReynolds' memoranda did not prohibit the payment of holiday pay to wage rate employees required to work on statutory holidays. The Comptroller General, in 22 C. G. 1059, pointed out:

> Presidential or administrative orders requiring work on legal holidays during the war emergency do not and cannot change the status of such holidays for the purpose of applying statutes and regulations having the force and effect of law granting rights and benefits on the basis of the holidays.

REASONS FOR DENYING THE WRIT

A. The Decision Below is Clearly Correct.

The decision of the court below holding that Kelly is entitled to holiday pay for designated statutory holidays when he was required to work on such days is clearly correct. It effectuates the intent of Congress and is consistent with the traditional administrative and judicial interpretations of holiday statutes providing holiday benefits for wage rate employees. Finally, the decision is so

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[29] Petitioner concedes that plaintiffs are entitled to premium wage rates for holidays in accordance with the wage agreement of October 27, 1924 (Pet. Br. 10). Thus, it is clear that Petitioner does not contend that the wartime policy of working on holidays, in and of itself, prohibits payment of more than a regular day's pay to wage rate employees required to work on a holiday.

[30] The Government's Brief in Opposition to the Petition for a Writ of Certiorari in the *Di Benedetto* case, emphasized that the holiday statutes involved herein were not applicable to per annum employees, as distinct from wage rate employees.

firmly grounded on principles of equity that even the dissenting opinion of the court below, upon which Petitioner relies, concedes that Petitioner's construction of the Joint Resolution of June 29, 1938, is inequitable. (R. 36). The court below characterized Petitioner's construction of the Joint Resolution of June 29, 1938, as an effort "to attribute to Congress an intention which it is morally certain Congress did not have * * *." (R. 31). Thus, it is apparent that there is neither a sound legal nor an equitable basis to warrant review of the decision by this Court.

B. There is No Showing That the Decision Below is of Substantial Public Importance.

Petitioner's suggestion that the decision of the court below will impose a heavy financial, administrative, and litigation burden upon the Government (Pet. Br. 9, 17) is without merit. If any litigation burden results, it is obvious that it would be a self-imposed burden. The clear-cut principles established by the decision below will determine the rights of all plaintiffs herein. Thus, no further litigation will be necessary after this Court's disposition of the instant case.

Petitioner's claim that the Government will be saddled with a heavy administrative burden as a result of the decision below is without basis. Petitioner concedes that plaintiffs are entitled to premium pay for hours worked on the same holidays involved herein in accordance with the wage agreement. (Pet. Br. 10). Precisely the same wage data which is necessary to compute the amount of such claims will yield the data required to compute the amounts due for the statutory holiday pay. Thus, it is apparent that no additional clerical burden will be imposed upon the Government other than that which it already is obligated to assume.

Petitioner's argument that the decision below will impose a heavy financial burden upon the Government is wholly unsupported. Petitioner claims that since the date

of the decision below, 1807 additional claims were filed for extra pay for holiday work. There is no showing that such claimants are wage rate employees entitled to statutory holiday pay under the principles established by the decision of the court below. Nor is there any evidence that the holiday benefits of such claimants were governed by a wage agreement similar to the one in the instant case.

Further, Petitioner's suggestion that "the implications of the decision below may extend" to many other Government employees not covered by the wage agreement of October 27, 1924 (Pet. Br. 18) is sheer conjecture as to a remote possibility. There is nothing in the record, nor does Petitioner offer any evidence, which suggests that the decision of the court below is applicable to such employees. In any event, the applicable six year statute of limitations in the Court of Claims will effectively bar the institution of suit in that court by any employee not included in the instant case, since all holidays which are the basis of the suit below occurred more than six years ago.

CONCLUSION

For all of the reasons set forth in this brief, it is respectfully submitted that the petition for a writ of certiorari to the United States Court of Claims should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 209.

UNITED STATES, *Petitioner*,

v.

JOHN STUART KELLY, ET AL., *Respondents*.

On Writ of Certiorari to the United States Court of Claims.

BRIEF FOR RESPONDENTS.

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BRIEF FOR RESPONDENTS.

OPINION BELOW.

The opinion of the United States Court of Claims is reported at 96 F. Supp. 611 (Ct. Cl., 1951).

JURISDICTION.

The judgment of the United States Court of Claims was entered on May 1, 1951 (R. 37-38). The petition for a writ of certiorari was filed on July 26, 1951, and was granted October 8, 1951 (R. 39). The jurisdiction of this Court is invoked under 28 U. S. C. 1255(1).

QUESTION PRESENTED.

Whether the Joint Resolution of June 29, 1938, deprives wage rate employees of the Government Printing Office of their right to gratuity pay when required to work on a statutory holiday occurring on a regular work day.

STATUTES AND CONTRACT PROVISION INVOLVED.

1. Joint Resolution of January 6, 1885, No. 5, 23 Stat. 516, as amended by the Joint Resolution of February 23, 1887, No. 6, 24 Stat. 644. This Joint Resolution provides:

> The employees of the Navy Yard, Government Printing Office, Bureau of Printing and Engraving, and all other per diem employees of the Government on duty at Washington, or elsewhere in the United States, shall be allowed the following holidays, to wit: The 1st day of January, the 22d day of February, the day of each year which is celebrated as "Memorial" or "Decoration Day", the 4th day of July, the 25th day of December, and such days as may be designated by the President as days for national thanksgiving, and shall receive the same pay as on other days.

2. Act of January 12, 1895, c. 23, § 46, 28 Stat. 607, 44 U. S. C. § 44. This Act provides:

> The employees of the Government Printing Office shall be allowed the following legal holidays with pay, to wit: The 1st day of January, the 22d day of February, the 4th day of July, the 25th day of December, Inauguration Day, Memorial Day, Labor's Holiday, and such day as may be designated by the President of the United States as a day of public fast or thanksgiving.

3. The Joint Resolution of June 29, 1938, c. 818, 52 Stat. 1246, 5 U. S. C. § 86a. The Joint Resolution provides:

> Whenever regular employees of the Federal Government whose compensation is fixed at a rate per day, per hour, or on a piece-work basis are relieved or prevented from working solely because of the occur-

rence of a holiday such as New Year's Day, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day or any other day declared a holiday by Federal statute or Executive Order, or any other day on which the departments and establishments of the Government are closed by Executive order, they shall receive the same pay for such days as for other days on which an ordinary day's work is performed.

Sec. 2. The joint resolution of January 6, 1885, U. S. C., title 5, sec. 86, and all other laws inconsistent or in conflict with the provisions of this Act are hereby repealed to the extent of such inconsistency or conflict.

4. The pertinent section of the holiday rate provision of the wage agreement of October 27, 1924, which was in effect at all times material hereto follows:

Holiday Rate. Employees required to work on a legal holiday or a special holiday declared by Executive Order shall be paid at the day rate plus 50 percent for all the time actually employed in addition to their gratuity pay for the holiday as provided by law; * * * (R. 7).

STATEMENT.

This case was presented to the United States Court of Claims upon a stipulation of facts agreed to by counsel for Respondents and Petitioner. Although the stipulation in this case pertained only to the claim of Respondent John Stuart Kelly, hereafter referred to as Kelly, the questions of law and fact are common to all Respondents in this action. (R. 5-6).

The Public Printer regularly employed Kelly as a journeyman printer in Washington, D. C., from September 1, 1943, to October 15, 1945 (R. 6). Kelly's compensation was fixed by a wage agreement negotiated by the Public Printer and a committee of employees representing the journeyman printers of the Government Printing Office (R. 6) pursuant

to the Act of June 7, 1924.[1] Kelly was required to, and did work on ten statutory holidays during the period September 1, 1943, to October 15, 1945.[2] For work performed on each of such holidays, Kelly was paid only for actual hours of work. He was not paid holiday gratuity pay.[3] Nor was he paid premium pay for hours of work on the holidays in accordance with the wage agreement of October 27, 1924, *supra* p. 3 (R. 7-8).

On April 23, 1948, Kelly submitted a claim to the Acting Public Printer requesting gratuity pay for the statutory holidays referred to above. Thereafter, this claim was forwarded to the Comptroller General's office. In addition, Kelly also requested premium pay for actual hours he was required to work on the above statutory holidays in accordance with the holiday rate provisions of the wage agreement (R. 8). The Comptroller General, in a decision characterized by the court below as "obviously surprising" (R. 30), denied Kelly's claim and ruled that he was only entitled to receive "exactly the same pay as those who were not required to work" (R. 30). The Comptroller General denied Kelly's claims upon the following grounds: First,

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[1] 43 Stat. 658, c. 354, § 1, 44 U. S. C. § 40.

[2] Petitioner attaches great importance to the fact that these holidays occurred during the war period when per annum employees were required to work on days normally observed as holidays pursuant to executive action (Pet. Br. 1-2). It also relies heavily on the fact that memoranda over the signature of the Administrative Assistant to the President were circulated to heads of executive departments advising them that days normally observed as holidays would be regular work days with the exception of Christmas (Pet. Br. 4, 5). It will be demonstrated hereafter in this brief that these factors are wholly irrelevant to the issue involved in this case.

[3] The court below pointed out that the term "gratuity" is inaccurate because Kelly was "as much entitled to it as he is to the rest of his pay" (R. 28). However, the term "gratuity" will be used in this brief to designate holiday pay in order to be consistent with Petitioner's use of the term.

that the provision of the wage agreement requiring payment of "gratuity pay for the holiday as provided by law" (R. 7) did not entitle Kelly to gratuity pay because the Joint Resolution of June 29, 1938, repealed the holiday gratuity pay statutes.[4] Second, that the provision of the wage agreement requiring payment of the day rate plus 50 percent for hours actually worked on a holiday was ineffective on the ground that the Act of March 28, 1934, 48 Stat. 522, 5 U. S. C. § 673c, did not permit payment at a rate in excess of the regular daily rate for work on holidays falling within the regular tour of duty (R. 4-5).

Kelly's suit in the court below was based upon two separate and distinct claims. One claim was for the payment of premium pay for hours of work performed on holidays in accordance with the wage agreement of October 27, 1924, *supra* p. 3. The second claim was for holiday gratuity pay pursuant to the Joint Resolution of June 29, 1938, and the Act of January 12, 1895, *supra* pp. 2-3, and other holiday statutes which allow holidays to wage rate employees such as Respondents.[5] With respect to the claim for holiday gratuity pay Petitioner contended that since Kelly was required to work on such statutory holidays, he should be deprived of his gratuity pay as well as his day of rest which were provided by statute. The court below rendered judgment in favor of Kelly on both claims (R. 35). The court unanimously agreed that Kelly was entitled to premium pay for hours worked on holidays in

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[4] In its brief, Petitioner erroneously refers to the Comptroller General's decision as holding that the Joint Resolution of June 29, 1938, "had abolished gratuity pay for *work performed* on holidays • • • " (Pet. Br. 7) [italics supplied]. It is apparent that Petitioner fails to distinguish premium pay for work performed on holidays from holiday gratuity pay which is *not* compensation for hours of work. There are numerous other instances where Petitioner fails to recognize this vital distinction in its arguments (Pet. Br. 8, 18, 35, 38-39).

[5] e. g., Act of May 13, 1938, c. 210, 52 Stat. 351, 5 U. S. C. 87a.

accordance with the wage agreement of October 27, 1924.[6] The court, two judges dissenting, also awarded Kelly gratuity pay when he was required to work on statutory holidays. However, even the dissenting judges conceded that their conclusion "seems inequitable" because "It would seem that the employee who is called back to work on a holiday should receive gratuity pay, plus regular pay, * * *, but * * * only Congress has the power to correct what does seem to be an inequity" (R. 36-37).

SUMMARY OF ARGUMENT.

The Joint Resolution of June 29, 1938, hereafter referred to as the 1938 Resolution, was enacted to correct an injustice to wage rate employees which grew out of an Executive Order excusing federal employees from duty on December 24, 1937. Consequently, wage rate employees who were excused from work on that day lost their wages for the day. To remedy this situation, a Resolution was introduced in the House of Representatives to provide compensation for such employees who were excused from duty on that day. This Resolution was amended and thereafter enacted to provide permanent "statutory authority for such payments as a general practice and thus obviate the necessity for special resolutions by Congress."

Petitioner contends that when wage rate employees are required to work on a holiday they should be deprived of gratuity pay allowed by statute because they have also been deprived of their day of rest. Petitioner's argument is based upon the premise that the 1938 Resolution repealed prior holiday statutes which allow such gratuity pay and that Respondents' rights must be determined solely by reference to the 1938 Resolution. Thereupon, Petitioner con-

[6] Although Petitioner contended below that § 23 of the Act of March 28, 1934, c. 102, Title II, § 23, 48 Stat. 522, 5 U. S. C. § 673c prohibited the payment of premium pay for work on holidays falling within the regular forty-hour work week, it now concedes that Kelly is entitled to such premium pay (Pet. Br. 8).

cludes that Respondents are not entitled to gratuity pay because the express terms of the 1938 Resolution provide gratuity pay for wage rate employees only when they are "relieved or prevented from working." Respondents' position is that the 1938 Resolution is not inconsistent with provisions of holiday statutes *in pari materia* which grant wage rate employees gratuity pay when required to work on statutory holidays.

I.

Under the Joint Resolution of January 6, 1885, and the Act of January 12, 1895, hereafter referred to as the 1895 Act, wage rate employees such as Kelly, are allowed designated holidays with pay. Whenever such employees are required to work on statutory holidays, they are entitled to their regular pay for hours of work in addition to the gratuity pay allowed by the statutes. Petitioner's argument that the 1895 Act was flatly repealed by the 1938 Resolution violates the fundamental rule against repeals by implication. It is clear that in the absence of an express repeal, the 1938 Resolution must be reconciled with the 1895 Act which is *in pari materia* and effect given to all provisions thereof to the extent that they are not inconsistent. The 1938 Resolution is silent with respect to payment of gratuity pay when employees are required to work on holidays occurring on regular work days. Thus, it is apparent that Respondents are entitled to gratuity pay when required to work on a statutory holiday occurring on a regular work day under the provisions of the 1895 Act which continue in effect because they are not inconsistent with the 1938 Resolution.

II.

Even if it is assumed that Kelly's right to gratuity pay must be determined solely by reference to the literal terms of the 1938 Resolution, as Petitioner contends, Kelly is nevertheless entitled to such pay when required to work on a statutory holiday occurring on a regular work day. The

statutory holidays which are referred to in the 1938 Resolution are in fact "allowed" by the 1895 Act and other holiday statutes *in pari materia*. See *John Di Benedetto* v. *United States*, 108 C. Cls. 18, 24 (1947) cert. denied 332 U. S. 763 (1947). The term "relieved or prevented" in the 1938 Resolution is consistent with the term "allowed" in the 1895 Act. It was established over fifty years ago that the 1895 Act which "allows" holidays is "self-executing" and both relieves and prevents employees from working. Although wage rate employees may be required to work on such days because of the necessities of the situation, they were nevertheless traditionally entitled to their gratuity pay allowed them by statute, in addition to pay for actual hours of work. It is apparent that the term "relieved or prevented" in the 1938 Resolution, merely describes the consequences of being "allowed" a holiday. Since the terms of the 1938 Resolution are consistent with the 1895 Act with respect to holidays occurring on regular work days, Respondents are similarly entitled under the 1938 Resolution to gratuity pay when required to work on such days in addition to pay for hours of work.

The terms "relieved or prevented" in the 1938 Resolution have no independent significance. They must be read in conjunction with the balance of the phrase "solely because of the occurrence of a holiday." This complete phrase in turn must be viewed against the background of the affirmative policy of Congress to improve generally the holiday pay status of "the lowest-paid group [wage rate] of employees in the Government service." When so viewed, it is apparent the phrase accomplishes a single narrow limitation upon holiday benefits provided by holiday statutes *in pari materia*. The legislative history establishes that the sole limitation which Congress sought to achieve was the elimination of gratuity pay for holidays occurring on non-work days, and as the court below pointed out, the words selected were "apt for that purpose." There is no evidence that Congress intended any further limitation of holiday benefits.

Petitioner's contention that the 1938 Resolution remitted the problem of additional compensation for holiday work to collective bargaining agreements and the discretion of employing agencies is unsupported by either legislative history or logic. Indeed, in 1938 Respondents' existing wage agreement providing premium pay for work on holidays was rendered a nullity because in 1934 the Comptroller General had ruled that such premium pay provision was contrary to law. Under such circumstances it is illogical to assume that Congress remitted the payment of additional compensation for holiday work to collective bargaining agreements and the discretion of employing agencies. In any event Petitioner's argument is without merit because the issue in this case does not involve premium pay for hours of work on a holiday. The issue herein is whether wage rate employees who are deprived of their day of rest when required to work on a statutory holiday occurring on a regular work day should also be deprived of their gratuity pay allowed by statute.

Petitioner also argues that Congress enacted the 1938 Resolution in order to equalize the holiday pay status of wage rate employees and per annum employees. The court below found that "there is no basis whatever for thinking that Congress intended to treat" this subject. Not only is there a complete absence of evidence in the legislative history to support Petitioner's contention, but the expressed legislative purpose of the 1938 Resolution was to "prevent an unintentional discrimination" against wage rate employees. Further, Petitioner's contention is illogical because in 1938, per annum employees enjoyed superior overall benefits with respect to pay for holidays and nonwork days as compared with wage rate employees.

III.

Petitioner's argument that the wartime policy of requiring employees to work on days normally observed as holidays deprived wage rate employees of the right to gratuity

pay is both without merit and irrelevant to the issue in this case. The wartime policy upon which Petitioner relies was promulgated by memoranda sent to heads of the executive departments by the Administrative Assistant to the President. Clearly, this policy, effectuated in 1943, has no significance in determining what Congress intended when it enacted the 1938 Resolution five years earlier, during a period of peace. In any event, the memoranda of the President's Administrative Assistant did not effect the right of wage rate employees to gratuity pay provided by statute. The memoranda merely informed the heads of executive departments that no holidays, with the exception of Christmas, would be declared by executive action during the war period. As a result there were no holidays, with the exception of Christmas, for per annum employees because their holidays are declared by executive action. However, the memoranda could not affect the rights of wage rate employees because their holidays as well as the gratuity pay are allowed by statute.

ARGUMENT.

I.

Wage Rate Employees Of The Government Printing Office Who Are Required To Work On Statutory Holidays Occurring On Regular Work Days Are Entitled To Holiday Gratuity Pay Under The 1895 Act.

The 1938 Resolution provides gratuity pay, "whenever regular employees of the Federal Government whose compensation is fixed at a rate per day, per hour, or on a piece-work basis are relieved or prevented from working solely because of the occurrence of a holiday such as New Year's Day, Washington's Birthday, * * *." These statutory holidays which are referred to in the 1938 Resolution are "allowed" with pay to employees of the Government Printing Office by the 1895 Act, and other holiday statutes *in pari materia*.

Petitioner contends that the 1938 Resolution deprives Kelly of his gratuity pay which wage rate[7] employees traditionally received under holiday statutes *in pari materia* when required to work on statutory holidays because he was not "relieved or prevented from working" on such holidays. Respondent's position is that the 1938 Resolution does not deprive Kelly of such gratuity pay because it is not inconsistent with provisions of holiday statutes *in pari materia* which traditionally entitled wage rate employees to gratuity pay when required to work on statutory holidays. The 1938 Resolution merely modifies holiday statutes *in pari materia* by eliminating the right to gratuity pay when the holiday occurs on a nonwork day.

A. Holiday Statutes in Pari Materia With the 1938 Resolution Grant Gratuity Pay to Wage Rate Employees When They Are Required to Work on a Statutory Holiday.

The Joint Resolution of April 16, 1880,[8] hereafter referred to as the 1880 Resolution, provided that "Employees of the Government Printing Office shall be allowed" designated holidays "with pay". The 1880 Resolution was superseded by the Joint Resolution of January 6, 1885,[9] hereafter referred to as the 1885 Resolution, *supra* p. 2. The 1885 Resolution merely increased the number of groups of wage rate employees entitled to holiday pay and "allowed" a greater number of statutory holidays. The 1895 Act which covered only employees of the Government Printing Office, superseded the 1885 Resolution with respect to such employees. Otherwise, the 1895

[7] The term "wage rate" employees, as used in this brief, includes per diem, per hour and piecework employees.

[8] No. 22, 21, Stat. 304.

[9] No. 5, 23 Stat. 516, as amended by the Joint Resolution of February 23, 1887, No. 6, 24 Stat. 644, 5 U. S. C. § 86.

Act differed from the 1885 Resolution only by the allowance of an additional holiday (Inauguration Day) with pay.

All of the foregoing statutes "allowed" wage rate employees designated holidays and provided gratuity pay for such days. None of them specifically referred to the right of employees to additional pay whenever they were required to work on statutory holidays. Nevertheless, they were uniformly construed to entitle such employees required to work on statutory holidays to their regular compensation for actual hours of work in addition to the gratuity pay allowed by statute. The rationale of this traditional construction was clearly stated in a ruling by the Comptroller General of the Treasury to the Public Printer in 1901. In 8 Comp. Gen. Treas. 322 (1901) he stated:

> I cannot reconcile with any ideas of equity and justice the proposition that Congress ever intended by this or any other statute to allow the employees (and we are now speaking of per diem employees * * *) a legal holiday with pay, and place it in the power of * * * any * * * person to cause any such employee so working to receive just the same amount of pay for said day as those who are not compelled to work, and no more.
>
> I know of no law which forces me to such a conclusion. I know of no act which is violated by giving such employees pay for work compelled from them on such holidays. A different construction makes the act of 1895 a simulacrum as to those who are compelled to labor on such holidays, and a reality to those who are not so compelled to work.
>
> * * * The giving him pay for such a day when he does not work is the free gift of Congress, and I will not stultify such gift by taking away from him his pay on a day for which he worked because Congress saw fit to give him pay for legal holidays when he did not work.[10]

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[10] In 1906, the Comptroller General of the Treasury reiterated this construction with respect to the 1885 Resolution, 13 Comp. Gen. Treas. 40 (1906). See also 3 Dec. Comp. Gen. 411 (1924).

The reasoning of the Comptroller General's decision which refused to "stultify" the grant of Congress was confirmed in *Emmett L. Adams* v. *The United States*, 42 C. Cls. 191, 212 (1907). In that case the court pointed out that "when the statute declares certain days to be holidays and provides that certain employees shall receive the same pay as on other days, they are thereby exempt from work, with pay, on such days." Thereupon, the court concluded that if such employees were required to work on such days, they would be entitled to their regular rate of pay in addition to the gratuity pay provided by statute.

Petitioner argues that the traditional practice of paying wage rate employees for hours of work in addition to gratuity pay allowed by law whenever they are required to work on a statutory holiday is "highly questionable" (Pet. Br. 33). This argument, which was not raised in the court below, is without merit because the fundamental premise upon which it is based is erroneous. Petitioner contends that the 1901 decision of the Comptroller General of the Treasury [11] misconstrued the 1895 Act. Petitioner's argument depends upon the tenuous premise that the Comptroller General of the Treasury "may have assumed that the 1883 Act[12] was repealed by the 1895 Act, * * *" (Pet. Br. 36). Petitioner concludes that because of such assumption the 1901 decision erroneously held that the 1895 Act *required* payment of gratuity pay instead of holding that it was merely *authorized* under the Act of 1883 (Pet. Br. 33-37). The basic error in Petitioner's argument is its failure to recognize that the Act of 1883 authorized payment of *premium pay for actual hours of work* on a holiday as distinct from gratuity pay which is unrelated to hours

[11] 8 Comp. Gen. Treas. 322 (1901), *supra*, p. 12.

[12] Act of January 13, 1883, 22 Stat. 402, authorized the Public Printer to pay premium rates of pay to employees for hours worked on holidays.

of work, provided by the 1895 Act.[13] Although Petitioner does not recognize this distinction between premium pay and gratuity pay, the reasoning of the 1901 decision clearly establishes that the Comptroller General of the Treasury was aware of this distinction and that the 1883 Act was immaterial. Finally, in 1906,[14] the Comptroller General of the Treasury ruled that the *required* payment of gratuity pay under the 1885 Resolution to wage rate employees of the Navy Yard required to work on a statutory holiday did not deprive them of their right to compensation for work performed. The Act of 1883 applied only to Government Printing Office employees, and was wholly unrelated to other wage rate employees such as Navy Yard employees covered by the 1885 Resolution. Since the Comptroller General's decision concerning the 1885 Resolution with respect to Navy Yard employees is identical with his 1901 decision with respect to Government Printing Office employees, it is manifest that the Comptroller General of the Treasury actually based his 1901 decision upon the fact that the terms of the 1895 Act *required* payment of gratuity pay to wage rate employees required to work on statutory holidays. It should be noted that in both the 1901 and 1906 decisions, there was no question raised as to whether the employees were entitled to gratuity pay when they worked on holidays. The sole question was whether the allowance of such gratuity pay by law deprived employees of their right to pay for hours of work on such days.

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[13] Petitioner's confusion with respect to the distinction between premium pay and gratuity pay is apparent in its erroneous statement that "It has been stipulated (R. 9), and found by the court, below (R. 25), that from 1895 to 1938 per diem workers in the Government Printing Office received double pay for holiday work" (Pet. Br. 35). Both the stipulation (R. 9) and the court below (R. 25) demonstrate in unmistakable terms that in fact such wage rate employees required to work on a statutory holiday received *gratuity pay* in addition to compensation for actual hours of work.

[14] 13 Comp. Gen. 40 (1906) See also 3 Dec. Comp. Gen. 411 (1924).

B. The Right of Wage Rate Employees to Gratuity Pay When Required to Work on a Statutory Holiday Cannot Be Ascertained Without Resort to Holiday Statutes in Pari Materia and the Legislative History of the 1938 Resolution.

1. *The 1938 Resolution does not repeal provisions of statutes in pari materia which are not inconsistent.*

Section 2 of the 1938 Resolution repeals all other laws *only* to the extent of any inconsistency or conflict with the Joint Resolution. Petitioner's argument that the meaning of the 1938 Resolution must be ascertained without reference to the provisions of the 1895 Act is based upon the assumption that the 1938 Resolution repealed all prior holiday statutes in their entirety[15] (Pet. Br. 18, 33). The fallacy of this assumption is clearly demonstrated in *John DiBenedetto* v. *United States*, 108 C. Cls. 18, 24, 25 (1947), cert. denied, 332 U. S. 763, which expressly recognizes that the 1885 Resolution[16] was not superseded, but only modified by the 1938 Resolution. That decision establishes that the 1938 Resolution merely refers to statutory holidays, but does not in fact allow such holidays. Other holiday statutes *in pari materia*, such as the 1885 Resolution, *supra* p. 2, and the 1895 Act, *supra*, p. 2, allow the statutory holidays referred to in the 1938 Resolution.

Petitioner's interpretation of the 1938 Resolution would result in the repeal by implication of the 1885 Resolution and the 1895 Act with respect to gratuity pay for employees required to work on statutory holidays. Such an interpretation violates the fundamental rule of statutory

[15] The general repeal clause of the 1938 Resolution repealed nothing that would not have been repealed without it. Thus, any repeal must be by implication. *Hoague-Sprague Corporation* v. *Frank C. Meyer Co., Inc.*, 31 F. 2d 583, 585, 586 (E. D. N. Y. 1929).

[16] The 1895 Act of course is in precisely the same status as the 1885 Resolution with respect to the allowance of statutory holidays.

construction that "Repeals by implication are not favored". *Federal Trade Commission* v. *A. P. W. Paper Co.*, 328 U. S. 193, 202 (1946). To the extent that the 1938 Resolution is not inconsistent with holiday statutes *in pari materia*, it must be presumed that it was enacted in accord with the legislative policy embodied in those prior statutes,[17] and effect must be given to all such statutes. *Sanford* v. *Commissioner of Internal Revenue*, 308 U. S. 39, 44 (1939).[18]

Petitioner contends that since the 1938 Resolution is "clear and unambiguous" its meaning must be found only in the literal words of the Resolution (Pet. Br. 17).[19] Read literally, the 1938 Resolution clearly applies only to the situation in which employees do not work on a holiday. It makes no reference to gratuity pay when employees are required to work on a holiday. However, the 1895 Act provides gratuity pay to employees who are required to work on a holiday. Thus, if the 1938 Resolution is read literally, and "taken to mean just what it says", as Petitioner contends, it clearly has no application to the issue involved herein, and the 1895 Act governs the right of Respondents in this case.

2. *Because Petitioner's interpretation of the 1938 Resolution results in extreme and inequitable consequences, resort to its legislative history is necessary.*

Petitioner claims that the 1938 Resolution "states the only condition under which holiday pay is statutorily required" (Pet. Br. 16). The extreme consequences of Petitioner's interpretation are readily apparent in decisions of the

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[17] Cf. *Layne-Western Co.* v. *Buchanan County, Mo.*, 85 F. 2d 343, 346 (C. A. 8th, 1936).

[18] *Posadas* v. *National City Bank of New York*, 296 U. S. 497, 503 (1936).

[19] It should be noted that Petitioner in effect concedes that the language is not clear and unambiguous because in another section of its brief it seeks to resort to the "spirit" of the law to support its interpretation of the literal words (Pet. Br. 29).

Comptroller General. He has held[20] that an employee who was not required to work on a designated holiday occurring on a work day must nevertheless show facts and circumstances to prove that he would have worked but for the sole fact that it was a holiday. In other words, under Petitioner's interpretation, unless an employee is in fact ready, willing, and able to go to work on the designated holiday, he is not entitled to gratuity pay, despite the fact that he was not required to work on that day. Similarly, if a wage rate employee were required to work two hours on a statutory holiday, he would be paid only for two hours of labor under Petitioner's interpretation. Thus, he would actually receive less pay than if he were not required to work on the holiday because he was not "relieved or prevented from working" on that day. The law is settled that where the literal import of the words of a statute leads to absurd results, as shown above, resort to legislative history is necessary to ascertain the legislative intent in order to modify the words of the statute accordingly.[21]

Not only does Petitioner's interpretation lead to absurd results, but as the court below pointed out in the follow-

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[20] See decision A-97265 of the Comptroller General (August 29, 1938) in which he ruled: "If an employee of a class to which this statute applies is not actually on the job at the close of the work day preceding the holiday, whether with or without permission, it is not to be presumed as a matter of course that he was relieved or prevented from working on the holiday solely because it was a holiday; and even though he was on the job at the close of the work day preceding the holiday, it does not necessarily follow that he would have worked on the next day if it had not been a holiday if he is not on the job at the beginning of the work day following the holiday."

[21] See *Helvering* v. *Hammel*, 311 U. S. 504, 511 (1941); *United States* v. *Katz*, 271 U. S. 354, 362 (1926). "The modern cases also indicate that courts today rather than beginning their inquiries with formal words of the acts consider from the start the legislative purpose and intention." Sutherland on *Statutory Construction*, 3rd ed. (1943), Vol. 2, Sec. 4701.

ing statement, such interpretation leads to highly inequitable consequences:

> It is completely unthinkable that the owner of a printing shop could, by practice, or by contract, maintain the policy as to holiday pay which the Government here seeks to attribute to Congress. * * * in no case which we have heard of, or can imagine, could an employer maintain a practice whereby an employee who worked on a holiday received merely the same pay as one who did not work (R. 31).

The decision below is consistent with the settled rule that where a literal interpretation of a statute leads to harsh or inequitable results, the court will "resort to the policy" of the law "to ameliorate its seeming harshness or to qualify its apparent absolutes * * *." *Markham* v. *Cabell*, 326 U. S. 404, 409 (1945).

II.

The Language Of The 1938 Resolution Is Consistent With The Language of Prior Holiday Statutes With Respect To Gratuity Pay For Employees Required To Work On Statutory Holidays Occurring On Regular Work Days.

A. The Term "Relieved or Prevented" in the 1938 Resolution Is Consistent With the Term "Allowed" in Prior Holiday Statutes.

It has already been established that the holidays referred to in the 1938 Resolution are in fact allowed by holiday statutes *in pari materia*. *Supra*, p. 15. Even assuming that the right of wage rate employees to gratuity pay must be determined solely by reference to the 1938 Resolution, as Petitioner contends (Pet. Br. 16), such employees required to work on statutory holidays are nevertheless, entitled to gratuity pay.

Normally a holiday is considered a "day of exemption from labor or work", or as a "day fixed by law for the sus-

pension of business in whole or in part."[22] It is contemplated that the departments and agencies of the Government will be closed on such days.[23] Under the 1885 Resolution and the 1895 Act which "allow" the holidays referred to in the 1938 Resolution, employees are both "relieved" and "prevented" from working. This principle was established fifty years ago by the Comptroller General of the Treasury. In his 1901 decision[24] referred to above, *supra* p. 12, he stated:

> The act of 1895, *supra*, granting certain holidays to the employees of your office with pay does not confer any discretion upon you. The act is self-executing. When one of those holidays arrives, it is only a question as to whether a person is an employee of your office on that date. If he is, the law does the rest. It grants him a holiday with pay. *It is not within your power to compel him to work on such a day unless such work is a matter of public necessity, nor is it within his right to perform his ordinary duties, unless such are works of necessity on that day, and claim pay for such ordinary day's work.* * * *. [Italics supplied.]

Under the 1885 Resolution and the 1895 Act, if an employee were required by the necessities of the situation to work on a holiday, he obviously was not "allowed" the holiday. Nevertheless he received his gratuity pay in addition to his pay for hours of actual work. Because the term "relieved or prevented" merely describes the consequence of being "allowed" a holiday, it is apparent that the 1938 Resolution is consistent with the 1895 Act with respect to payment of gratuity pay when wage rate employees are required to work on a statutory holiday. Thus, under the 1938 Resolution, if an employee is not "relieved

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[22] Webster's New International Dictionary, Second Ed. Unabridged, 1948.

[23] See Ismar Baruch, Federal Holiday Pay Policies, Vol. 8 *Personnel Administration* p. 15.

[24] 8 Comp. Gen. Treas. 322 (1901).

or prevented from working", on a holiday which is allowed him, because the necessities of the situation require him to work on that day, he is similarly entitled to his gratuity pay. In the complete absence of any evidence of a contrary legislative intent it should be presumed that Congress intended to continue this traditional construction of provisions of prior holiday statutes. *United States* v. *Missouri Pac. R. Co.*, 278 U. S. 269 (1929); *United States* v. *Jackson*, 280 U. S. 183 (1930).

B. The Legislative History of the 1938 Resolution Demonstrates That Its Purpose Was to Broaden the Scope of Prior Holiday Statutes.

The 1938 Resolution was enacted to correct an injustice to wage-rate employees which grew out of an Executive Order, dated December 6, 1937, excusing federal employees from duty on December 24, 1937.[25] Since the Executive Order failed to provide pay for the holiday, wage rate employees lost their wages for the day. To remedy this situation, Mr. Ramspeck introduced a Resolution[26] in the House of Representatives, providing compensation for such employees who were excused from duty on that day. This Resolution was referred to the Committee on Civil Service. The Committee was advised by the United States Civil Service Commission that "there is the broader question involved of securing statutory authority for such payments as a general practice and thus obviate the necessity for special resolutions by Congress." H. R. Rep. No. 2683, page 2. Petitioner relies upon this statement in support of its contention that Congress intended a broad general revision of holiday pay practices in the Federal Government (Pet. Br. 28, 29). It is clear however, that the Commission's statement fails to support Petitioner's contention since it refers solely to the recurring problem of Executive

[25] Executive Order No. 7763, dated December 6, 1937; see H. R. Rep. No. 2683 (1938), 75th Cong., 3rd Sess.

[26] H. J. Res. 551 introduced on January 5, 1938.

Order holidays and merely suggested amending the Resolution so that it would cover future similar situations.

The immediate purpose of the 1938 Resolution was to eliminate the loss of wages by wage rate employees caused by uncompensated Executive Order holidays. This intent is readily apparent from the following colloquy between Mr. Ramspeck and Mrs. Rogers on the floor of the House during passage of the Joint Resolution. 83 Cong. Rec. 9466 (1938):

> *Mr. Ramspeck:* This covers the lowest-paid group of employees in the Government service. It is those who work on a per diem basis. For instance, last Christmas Eve the President excused all Government employees from rendering any service. His Executive Order, of course, applied to every employee in the Government service. Those who are working on a monthly salary got their pay for Christmas Eve, but those who work on a per diem were forced to take the day off, and they lost the day's pay. This is simply to correct that situation.
>
> *Mrs. Rogers:* This simply prevents an unintentional discrimination.
>
> *Mr. Ramspeck:* That is correct. The per diem employees are unintentionally discriminated against.

Prior to the 1938 Resolution, there was no statute which provided gratuity pay for Executive Order holidays or days when the Government departments were closed by Executive Order. In addition to providing gratuity pay for Executive Order holidays for wage rate employees, the 1938 Resolution also increased the number of employees entitled to such pay. It covered all regular wage rate employees of the Federal Government as compared with the more limited scope of prior holiday statutes.[27] Thus, it is

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[27] The 1885 Resolution was limited to employees of the Navy Yard, Government Printing Office, Bureau of Printing and Engraving and other per diem employees in the United States. Temporary per diem employees and per diem employees whose duties were not

clear that the primary purpose was to broaden the scope of prior holiday statutes.[28]

C. Congress Intended to Eliminate Gratuity Pay for Holidays Occurring on Non Work Days and Used Apt Words to Accomplish This Sole Limitation of Benefits Granted by Prior Holiday Statutes.

Petitioner contends that Committee Report No. 2683 establishes that Congress intended to deprive wage rate employees of gratuity pay when required to work on a statutory holiday. To support its conclusion, Petitioner refers to certain passages appearing in the Acting Comptroller General's letter to the Secretary of the Navy, which was included in the Committee Report. Petitioner emphasizes that the letter points out in two places that wage rate employees required to work on a holiday receive "double pay" (Pet. Br. 31). It relies upon such references as evidence of a legislative intent to deprive wage rate employees required to work on a holiday of their gratuity pay. Examination of the references upon which Petitioner relies reveals that Petitioner is confused with respect to one reference (H. R. Rep. 2683, p. 4) and inaccurate with respect to the other (H. R. Rep. 2683, p. 5). The reference on page 4 of the Report refers to the right of wage rate employees "to extra pay at a higher rate for all services rendered outside of regular business hours * * *." Obviously, this reference is to premium or overtime pay as distinct from

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in a recognized trade or craft were excluded from its benefits. The 1895 Act covered only employees of the Government Printing Office. 14 Comp. Gen. 818, 820 (1935); 16 Comp. Gen. 912 (1937).

[28] H. R. Rep. No. 2683, 75th Cong. 3rd Sess. 2 (1938) contains a letter from Harry B. Mitchell, President of the Civil Service Commission, to Congressman Ramspeck, which states: "It is believed that the President had in view that the benefits of the holiday be accorded to all classes of employees to the greatest extent possible."

gratuity pay. The other reference on page 5 of the Report, upon which Petitioner relies, reads as follows:

> * * * when any of such holidays falls on a nonworkday (such as a Saturday), such employees receive pay for the holiday when no work is performed thereon, in addition to the full week's pay otherwise earned, and double compensation for the day if work is performed thereon.

It is obvious that this passage does not refer to gratuity pay for wage rate employees required to work on a statutory holiday occurring on a *regular work day*. The reference to "double compensation" relates to the payment of such compensation to wage rate employees required to work on a statutory holiday occurring on a *nonwork* day. Clearly, if gratuity pay is eliminated for statutory holidays occurring on nonwork days, the employee required to work on such days would not receive "double compensation", but would merely receive his regular rate of pay for the day. Thus, it is apparent that the Committee Report did not, as Petitioner contends, specifically deal with the subject of gratuity pay for employees required to work on statutory holidays occurring *on regular work days*.

The significance of the phrase "Whenever * * * employees * * * are relieved or prevented from working solely because of the occurrence of a holiday" must be viewed against the background of the affirmative policy of Congress to improve substantially the holiday pay status of wage-rate employees and to remedy discrimination against them as reflected in Committee Report No. 2683, *supra* p. 22. Conceding that the phrase is a limiting one, the extent of the limitation must be derived from an examination of the cause which inspired it as revealed by the available legislative material. The scope of such limitation is readily perceived in Committee Report No. 2683 which establishes that the phrase is merely intended to limit holiday gratuity pay to holidays which occur on regular work days. The

letter from the Acting Comptroller General contained in Committee Report No. 2683, pages 3-5, pointed out in the language quoted above that under existing holiday statutes wage rate employees were entitled to gratuity pay for holidays which fell on nonwork days, *supra* p. 23. The quotation from his letter continues as follows:

> During the calendar year 1936 navy yard per diem employees, as well as other per diem employees of the Government to whom the 40-hour-week statute is applicable, were paid 3 days gratuity pay under the holiday statutes, over and above their full earnings for the year, by reason of the fact that February 22, May 30, and July 4, 1936, fell on Saturday nonwork days. (See 15 Comp. Gen. 700; id. 809). It is noted in this connection that December 25, 1937, and January 1, 1938, each will fall on a Saturday.

The legislative history of the 1938 Resolution is wholly devoid of any evidence that Congress intended any limitation of gratuity pay granted by prior holiday statutes other than the elimination of gratuity pay for holidays occurring on nonwork days. Thus it is apparent that Petitioner seeks, without basis, to extend the scope of the limitation to deprive Kelly of his right to gratuity pay when required to work on a statutory holiday occurring on a regular work day. The court below rejected Petitioner's contention as follows:

> The Civil Service Commission and the House Committee in enlarging the scope of the resolution obviously had noted the Comptroller General's comment, quoted in the committee report, that the existing legislation had been so interpreted as to give employees pay for a holiday coming on a day when they would not have worked anyway. To prevent that unduly generous treatment, the language "whenever * * * employees * * * are relieved or prevented from working solely because of the occurrence of a holiday" was inserted. The words were apt for that purpose. * * * They had a purpose and were, for that purpose well chosen. We are asked only to hold that they should not be given

an additional application, which, taken literally, they could receive, when all the indications are that they were not meant to have it (R. 30-31).

Although the 1938 Resolution eliminated gratuity pay for statutory holidays occurring on a nonwork day, it is clear that wage rate employees are entitled to such pay when required to work on a holiday occurring on a regular work day. The court below pointed out that "The evil which Congress meant to cure by the words it used, it cured. The additional effect contended for by the Government would destroy a practice which no one had ever even intimated to be an evil, and which responsible officials had, for more than forty years, regarded as just and necessary" (R. 31).

D. The 1938 Resolution Is Not Concerned With Nor Does It Refer To The Payment Of Premium Pay For Work Performed On A Holiday.

Petitioner contends that the 1938 Resolution deprives wage rate employees of their gratuity pay when required to work on a statutory holiday because it remitted the "problem of additional compensation for holiday work • • • to the processes of collective bargaining and the discretion of the employing agencies" (Pet. Br. 19). Petitioner suggests that "It was quite appropriate for the 1938 Resolution to take this position with respect to premium pay" (Pet. Br. 19). Petitioner's argument is without substance because it utterly ignores the fact that premium compensation for holiday work was not paid to wage rate employees at the time the 1938 Resolution was enacted.[29] In

[29] Petitioner states that the payment of premium compensation for holiday work equal to 100% of the regular rate of pay since May 28, 1946, is evidence of the intent to remit the payment of holiday compensation to wage agreements (Pet. Br. 32). Obviously, the institution of a practice eight years after the enactment of the 1938 Resolution can have no bearing on its legislative intent. Nor can the decision of the court below awarding 50% premium pay to Respondents for work performed on holidays subsequent to 1943 have any effect on the construction of the 1938 Resolution.

1934, the Comptroller General, in 13 Comp. Gen. 295, ruled that employees of the Government Printing Office could not legally be paid premium pay for hours of work performed on holidays despite a wage agreement providing for such premium pay (R. 5, 32). Thereafter, this prohibition against payment of premium pay continued in effect until February 7, 1946, 25 Comp. Gen. 584, 589, when the Comptroller General reversed his 1934 ruling. It certainly cannot be presumed that Congress intended to remit payments of premium pay to wage agreements and the discretion of employing agencies at a time when such payments were in fact not made.

Petitioner argues that the failure of employees of the Government Printing Office to request "a revision of the pertinent terms" of their wage agreement "must be considered an acquiescence in the ruling of the Comptroller General" with respect to gratuity pay (Pet. Br. 22). In view of the fact that their existing wage agreement, *supra*, p. 3,[30] which required payment of premium pay for work performed on holidays was rendered ineffective by the Comptroller General's decision, it is obvious that a request for a revision of the wage agreement would have been a futile gesture. Therefore, it is clear that there was no acquiescence.

E. The Comptroller General's Interpretation Of The 1938 Resolution And The Annotation In The United States Code Relative To The 1938 Resolution Are Entitled To No Weight.

The Comptroller General's interpretation of the 1938 Resolution is entitled to no weight because it is predicated upon the erroneous assumption that the 1938 Resolution flatly repealed holiday statutes *in pari materia* which grant gratuity pay.[31] It has been demonstrated, *supra*, p. 15,

[30] The wage agreement in 1938 required payment of "day rate plus 50 per cent for all time actually employed" on holidays.

[31] 18 Comp. Gen. 191, 192 (1938).

that the 1938 Resolution merely modified prior holiday statutes *in pari materia* and did not repeal them. See *John Di Benedetto* v. *United States, supra,* p. 15. The law is settled that statutes *in pari materia* must be construed together, giving effect if possible to the legislative policy embodied in those prior statutes.[32] Thus, it is evident that the Comptroller General's decisions are entitled to no consideration because they made no effort to reconcile the provisions of the 1885 Resolution and the 1895 Act with the 1938 Resolution.

Petitioner claims that the interpretation of the 1938 Resolution of the House Committee on Revision of Laws, as reflected in the annotations to 5 U. S. C. 86 and 44 U. S. C. 44 in the 1940 edition of the United States Code are entitled to great weight (Pet. Br. 24). There is no merit to this contention because the Committee does not purport and has no authority to construe statutes.[33]

In *Murrell* v. *Western Union Tel. Co.*, 160 F. 2d 787, 788 (C. A. 5th, 1947), the court held as follows:

> The United States Code was not enacted as a statute, nor can it be construed as such. It is only a *prima facie* statement of the statute law. The statutes collected in it did not change their meaning nor acquire any new force by their inclusion. *If construction is necessary*, recourse must be had to the original statutes themselves. Section 2(a) of the Act of June 30, 1926, 44 Stats. Part 1, Page 1.[34] [Italics supplied.]

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[32] See Respondent's Brief, supra, pp. 15-16.

[33] The House Committee on Revision of Laws merely supervised the consolidation of the Code. "The actual work of preparing and editing the material * * * was done by the West Publishing Co. * * * and the Edward Thompson Co. * * *" Preface to 1946 Ed. Page IX, United States Code.

[34] The cases relied upon by Petitioner (Pet. Br. 24) to support its contention that the annotations are entitled to great weight do not support its contention. Those cases merely hold that where there is no inconsistency between the United States Code and the Statutes at Large, the Code shall constitute *prima facie* evidence of the law.

F. There Is No Evidence That Congress Intended the 1938 Resolution to Deprive Wage Rate Employees of Holiday Benefits in Order to Equalize the Holiday Status of Wage Rate and Per Annum Employees.

Petitioner contends that Congress intended to deprive wage rate employees of their traditional right to gratuity pay when required to work on a holiday occurring on a regular work day in order "to equalize the position of per diem and per annum workers with respect to holiday pay" (Pet. Br. 12). The court below disposed of Petitioner's contention in the following language:

> The Government suggests that the fact that per annum employees, at that time, received no extra pay when they were required to work on a holiday was a discrimination, which the Government's interpretation would eliminate. But that difference had existed for some forty-five years, no mention had been made of it in connection with this legislation; and there is no basis whatever for thinking that Congress intended to treat it. It was apparently, a recognized difference between the status of a per annum employee with his relatively secure tenure, and a per diem craftsman (R. 31).

Not only is there a complete absence of evidence in the legislative materials to support Petitioner's argument that the 1938 Resolution was enacted to equalize the holiday status of per annum employees with wage rate employees, but the expressed legislative purpose of the 1938 Resolution was to prevent "an unintentional discrimination" against "the lowest-paid group [wage rate] of employees in the Government Service." These two factors demonstrate that there is no basis in the legislative history of the 1938 Resolution to support Petitioner's argument.

Petitioner's assumption that Congress intended to equalize the holiday pay status of wage rate and per annum employees is predicated upon an erroneous conception that wage rate employees in fact enjoyed preferential treatment

as compared with per annum employees. On the contrary, at the time of the enactment of the 1938 Resolution, the Government's overall compensation policy for holidays and other nonwork days was substantially superior for per annum employees. In 1938, per annum employees were paid for every day of the year, and could be required to work on all Saturdays, Sundays and holidays[35] (Pet. Br. 25). However, most per annum employees were not required to work beyond their regular work week. On the other hand, in 1938, wage rate employees were not paid for nonwork days such as Saturdays or Sundays,[36] unless required to work on such days. Indeed, in the case of many hourly rate employees, there is no guaranteed work week and they may be laid off with only part of a day's earnings because there is insufficient work to keep them occupied for a full day. Thus, a discrimination existed, in fact, in favor of per annum employees.

Petitioner's argument also presumes that there is a single holiday pay standard which Congress sought to achieve by the simple expedient of depriving wage rate employees of gratuity pay when required to work on a statutory holiday (Pet. Br. 29). It arbitrarily assumes that all federal employees are divided into two general classifications, per annum employees and wage rate employees. Further, it assumes that all per annum employees are treated similarly with respect to holiday compensation, and that the same is true for all groups of wage rate employees. Petitioner fails to recognize that with respect to holiday pay practices as well as general employment conditions that Federal employees have traditionally been classified into numerous groups without uniform treatment. In a report by the

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[35] *Digest of Provisions of Law Fixing Pay for Employees in the Executive Branch of the Federal Government*, at p. 93.

[36] The sole exception was the occasional instance when wage rate employees received gratuity pay when a statutory holiday occurred on a nonwork day.

Hoover Commission[37] concerning federal personnel pay practices, this lack of uniformity was clearly pointed out in the following language:

> While 92 percent of all federal positions are subject to the same employment regulations, only 42 per cent are subject to any single set of pay policies. In fact, federal employees fall into five distinct groups for pay purposes, and each group is subject to widely different policies.[38]

The wide variations in holiday pay practices among various groups of federal employees are described by Ismar Baruch in *Federal Holiday Pay Policies, Personnel Administration,* Vol. 8, pp. 15, 17, as follows:

> In the Federal Service, the statutes are not uniform on this point. Some groups are granted premium pay for holiday work; some are permitted compensatory time off in lieu of extra pay; and some receive only the same pay for holiday work as they would receive if they were officially excused from working on a holiday.[39]

The lack of uniformity in holiday pay practices and other employment conditions referred to by Mr. Baruch and the Hoover Report exists among various groups of per annum employees as well as among groups of wage rate employees.

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[37] *Task Force Report on Federal Personnel* prepared for the Commission on Organization of The Executive Branch of The Government, January, 1949, pages 43, 44. See also page 57.

[38] The five groups are listed as follows: (a) Classification Act (white collar) employees; (b) Wage Board (blue collar) employees; (c) Postal Service employees; (d) Special legislative employees; custom clerk; Foreign Service; Immigration Inspectors; (e) Excepted employees (R. F. C. and T. V. A., etc., employees).

[39] The extent of the widely varying holiday pay practices applicable to Federal employees is also readily perceived from an examination of Part VIII of *The Digest of Provisions of Law Fixing Pay for Employees in the Executive Branch of the Government, supra,* at pp. 93-98.

Not only were there differences in holiday pay practices among various groups of wage rate employees[40] but there are also wide differences among different groups of per annum employees. For example, certain per annum employees of the Treasury Department required to work on a holiday in 1938 were entitled to three times their basic rate of compensation for such days of work.[41] Others, such as per annum employees of the Superintendent of Documents receive the same compensation for work on holidays as is "* * * allowed * * * [wage rate] employees of the Government Printing Office * * *."[42]

The court below pointed out that the foregoing differences in holiday pay practices as well as differences in conditions of employment among the various groups of federal employees had existed for many years. Indeed, Congress still recognizes that differences in premium and holiday pay practices exist. The Committee on Post Office and Civil Service of the United States Senate, in its report on the Federal Employees Pay Act of 1952 recommended that:

> Development of a single overtime, night, and holiday pay plan for application throughout the Federal service would be undesirable at this time. So long as fundamentally different base pay plans exist, it is logical to continue correspondingly different premium pay plans.[43]

Since the Senate Committee recognized that the development of a uniform holiday pay plan today would require consideration of numerous interrelated factors such as

[40] For example, the 1895 Act grants a statutory holiday (Inauguration Day) to employees of the Government Printing Office which has not been allowed *by statute* to any other wage rate employees up to the present.

[41] Act of February 13, 1911, c. 46, § 5, 36 Stat. 901, 19 U. S. C. 26.

[42] Act of March 4, 1925, c. 549, § 1, 43 Stat. 1300, 44 U. S. C. § 73.

[43] Committee Report No. 843, 82d Cong., 1st Sess. (1951) page 3.

base pay differences, it is illogical to assume that Congress would have sought to "equalize" the holiday pay status of all federal employees in 1938 without Committee Hearings or reference thereto in the Committee Report.

III.

The Wartime Policy Requiring Government Employees To Work On Days Normally Observed As Holidays Does Not Deprive Wage Rate Employees Of Their Right To Gratuity Pay When Required To Work On Statutory Holidays.

Petitioner claims that the court below overlooked the fact that the holidays involved herein occurred during the war period (Pet. Br. 38). It asserts that the promulgation of a wartime policy of requiring employees to work on days normally observed as holidays deprives Respondents of their right to gratuity pay (Pet. Br. 39). To support its argument, Petitioner relies upon memoranda which were sent to the heads of executive departments and agencies by W. H. McReynolds, Administrative Assistant to the President. Despite the fact that Petitioner failed to mention the memoranda in its brief or argument in the court below, it now relies for the first time upon the memoranda as a bar to Kelly's claim. However, Petitioner fails to show that the wartime policy is relevant to the issue in this case. Clearly, this policy, promulgated in 1943, has no significance in determining what Congress intended when it enacted the 1938 Resolution five years earlier, during a period of peace.

Further, as will be demonstrated hereafter, the wartime policy does not, in and of itself, bar the payment of gratuity pay to wage rate employees required to work on a statutory holiday. The memorandum of May 12, 1943, merely informed the heads of executive departments and agencies that "days normally observed * * * as holidays should with the exception of Christmas be considered as regular work

days for the duration of the war"[44] (Pet. Br. 5-6, 38). On December 17, 1943, a similar memorandum was sent to heads of executive departments and agencies over the signature of W. H. McReynolds. This memorandum contained the observation that holiday work is performed by federal employees without additional compensation (Pet. Br. 5, 6, 38). These memoranda are the bases of the wartime policy upon which Petitioner relies in support of its argument. However, the only significance of these memoranda is that they merely advised the executive heads of departments that days normally observed as holidays as a result of executive action, with the exception of Christmas, would be regular work days. Thus, for those per annum employees who normally received premium rates of pay for work on holidays, the basis of such payment was eliminated because holidays for per annum employees were not declared. The memoranda did not[45] and could not refer to wage rate employees, because holidays for such employees are allowed by statute[46] as distinct from executive action.[47]

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[44] *Digest of Provisions of Law Fixing Pay For Employees In The Executive Branch of the Federal Government, supra,* at p. 94.

[45] Petitioner's own citation to the *Digest of Provisions of Law Fixing Pay For Employees in the Executive Branch of the Federal Government,* March, 1945, at p. 94, confirms the fact that the memoranda applied only to per annum employees. A separate section of the same *Digest,* at p. 96, which lists statutory holiday provisions for wage rate employees, makes no reference to McReynolds' memoranda.

[46] See decision of the Comptroller General, 22 Comp. Gen. 1054, in which he pointed out that: "Presidential or administrative orders requiring work on legal holidays during the war emergency do not and cannot change the status of such [statutory] holidays for the purpose of applying statutes and regulations having the force and effect of law granting rights and benefits on the basis of the holidays."

[47] Petitioner relies upon the Federal Employees Pay Act of 1945 to support its wartime policy argument (Pet. Br. 38-39). However, the Committee Report accompanying the Act conclusively establishes that Congress recognized that the only holidays allowed per annum employees were those provided by executive declaration. The

Petitioner argues that Respondents were not entitled to "premium pay" during the war period because "normal peacetime holidays were * * * converted into regular work days" (Pet. Br. 38, 39). Petitioner's argument is without substance because it wholly ignores the legal basis upon which wage rate employees are entitled to holiday pay with respect to the holidays involved in this case. Respondent submits that although the days normally observed as holidays were regular work days for per annum employees, such days were in fact statutory holidays for wage rate employees. In *DiBenedetto* v. *United States*, 108 C. Cls. 18, 24, 25 (1947) cert. denied 332 U.S. 763 (1947), the court pointed out that the 1885 Resolution is "limited to per diem employees" and had no "application to the plaintiff who is paid on a per annum basis."[48] The court stated at page 25 with respect to per annum employees:

> There is no statute defining any day as a day on which they may not be required to work, or as a holiday for any purpose, in relation *to them* [per annum employees]. The days on which they have customarily been excused, before and since the war period have been determined by the executive branch of the Government. [Italics supplied.]

Although the court denied premium pay to per annum employees in the *Di Benedetto* case, it clearly indicated that if statutes allowing holidays for wage rate employees had also been applicable to per annum employees, the latter would have been entitled to premium pay. In any event, Petitioner has already conceded that Respondents

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report states at page 13 "As to any given holiday, it [Section 302 of the Act] could take effect earlier if the President has declared that such a holiday shall not be generally a work day in the Federal Service. Such a declaration already exists with respect to Christmas." H. R. Rep. No. 726, 79th Cong. 1st Sess.

[48] The Government's Brief in Opposition to the Petition for a Writ of Certiorari in the *Di Benedetto* case, emphasized that the holiday statutes involved herein were not applicable to per annum employees, as distinct from wage rate employees.

are entitled to premium rates of pay for work on statutory holidays (Pet. Br. 8, 45). Thus, it is clear that Petitioner cannot now argue consistently that the wartime policy prohibits the payment of gratuity pay to wage rate employees.

CONCLUSION.

For all of the reasons set forth in this brief, it is respectfully submitted that the decision of the court below is correct and should be affirmed.

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